United States Court of Appeals

for the Second Circuit

APPENDIX

75-7344

75-7344

IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 75-7344

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

Plaintiffs-Appellants,

-against-

IRA JAY SANDS and F.S. MANAGEMENT CORP.,

Defendants-Appellees.

On Appeal From a Judgment in the United States District Court For the Southern District of New York

JOINT APPENDIX

SCHWARTZ, KAUFMANN & SKLAVER
Attorneys for Plaintiffs-Appellants
115 Broadway
New York, N.Y. 10006

WEINSTEIN & LEVINSON
Attorneys for Defendants-Appellees
11 Park Place
New York, N.Y. 10007

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CONTENTS OF JOINT APPENDIX

RELEVANT DOCKET ENTRIES

Date	Proceedings
Jul 26-72	Filed Complaint. Issued Summons.
Oct 13.72	Filed Dfts. Notice of Motion. Re: Dismiss complaint. ret. 10/27/72. BHS&H
Oct 12-73	Filed MEMO Opinion # 39913: *** Deft. motion to dismiss the non-drivative claim is denied; the motion is granted as to the derivative claim. Pltfs. motion for the appointment of a receiver is denied; their motion for a class action determination is granted. Submit order on notice. LASKER,J.
Nov. 19-73	Filed order that defts' motion to dismiss is granted to the extent that the derivative claim asserted herein by pltffs. is dismissed.-Defts. shall serve their answer to the complaint within 10 days--the caption of this action is amended-motion by pltffs. for the appointment of a receiver is denied-pltffs' motion for a class action determination is granted--on or before 12-15-73-notice of this class action shall be given by the defts. to all members of the class Proof under oath of mailing of the notice to all class members in accordance with this order shall be filed by defts. with the Clerk of the Court within 5 days. after such mailing is complete--Lasker, J.-mailed notice.
Mar.11-74	Filed affdvt 9(g) statement & notice of motion by pltff for summary judgment. Ret. 3-21-74.
Jul 2-74	Filed Memorandum #40921--In view of the foregoing, Sands' motions are denied and the beckermans' motion for summary judgment on the issue of liability is granted. We defer consideration of the Beckermans' motion to remove Sands as agent for investors. The parties are instructed to prepare for a conference with the Court to discuss the method of accounting by Sands and F.S. Management and the further progress of the case. It is so ordered...Lasker, J. m/n
Jul.12-74	Filed defts notice of motion for reargument. Ret. 7-22-74.

Date	Proceedings
Aug 6-74	Filed Pltffs request for production of documents, etc.
Aug 6-74	Filed Pltffs' Interrogs.
Nov 21-74	Filed Memorandum#41465 & Order........Although we are unable to grant defts' motion for summary judgment for the reasons stated, the Beckermans' complt., which has not been amended to reflect dismissal of their purportedly aggregable claims, is defective in serveral respects. Accordingly, the Beckermans are directed to file an amended complt. recasting the suit as one for compensatory and punitive damages, if indeed, as pltffs' asserrt, that is what it is. The amended complt. should contain the the requisite good faith allegation that each member of the class claims in excess of $10,000. and set forth factual allegations appropriate to a suit for punitive damages. The matter will be ref. to Mag. Schrieber, as a special Master to Report & Recommend as to the award of damages......We shall review the question of jurisdictional amount at such time as we act upon the Master's report...The Motion for summary judgment is denied subject to the condition set forth....It is so Ordered. ....Lasker, J. m/n
Dec 13-74	Filed Amended Complaint-Class Action.
Jan 14-75	Filed Defts' Notice of Motion to dismiss the amended compt. etc....ret. 1-24-75, at 10AM Rm 2903.
Feb 3-75	Filed Pltffs' Motion for an order directing the defts. to answer the interrogs. .....ret. 2-13-75.....Rm 2903. At 10AM.
3-21-75	Filed Memo-End on back of Motion filed 2-3-75..... The Motion is denied as moot inlieu of granting motion to dismiss...It is so ordered....Lasker,J. mn
3-21-75	Filed Memorandum#42073....Accordingly, Defts' motion to dismiss the complt is granted...No Costs to either Side...It is so ordered...Lasker,J.mn
3-27-75	Filed Judgment....Ordered that the complt. is dismissed w/o costs to either side. ......Lasker, J. mn Judgment Entered...3-31-75....Clerk. ent 4-1-75
4-4-75	Filed Pltffs' Notice of Motion for an order vacating the judgment ent. 3-31-75... ....ret. 4-14-75...at 10Am Rm 2903.

Date	Proceedings
4-15-75	Filed Memo-End on back of Motion filed 4-4-75.... ...The Motion is denied. It is so ordered..... Lasker,J. mn
6-6-75	Filed Pltffs' Notice of Appeal to USCA from the final judg. entered on 3-31-75...copy mailed on 6-9-75 to:Weinstein & Levinson. Esqs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, a New York trust, similarly situated, and in the right of Times Square Associates,

Plaintiffs,

-against-

IRA J. SANDS, F. S. MANAGEMENT CORP. and TIMES SQUARE ASSOCIATES,

Defendants.

---X

Docket No.

COMPLAINT - CLASS ACTION

Plaintiffs, by Schwartz, Kaufmann & Sklaver, their attorneys, complaining of the defendants, allege:

JURISDICTION AND VENUE

1. Plaintiffs are citizens of the State of Florida. Defendant Ira J. Sands ("Sands") is an individual citizen of the State of New York. Upon information and belief, defendant F. S. Management Corp. ("F. S. Management"), is a New York corporation. Defendant Times Square Associates ("Associates") was organized in 1951 as a New York general partnership but is presently a New York trust of which defendant Sands is the trustee and plaintiffs and the members of the class on whose behalf this action is brought are beneficiaries. All defendants have an office for the regular conduct of business at 701 Seventh Avenue, New York, New York, within the territorial jurisdiction of this Court.

The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000

GENERAL ALLEGATIONS

2. Heretofore in approximately 1951, Sands, together with Jerome Wishner and George Gewanter (herein called the "General Partners") organized Associates as a general partnership with themselves as the sole partners for the purpose of acquiring a then existing long-term net lease on the premises known as 701 Seventh Avenue, in the Borough of Manhattan, City and State of New York (herein called the "Premises").

3. In approximately June 1961, Associates became a publicly-held real estate syndicate by each of the General Partners selling $187,500 of participating interests in his own partnership interest to members of the public and in connection with such sales issuing a Prospectus in the form annexed as Exhibit 1.

4. Upon information and belief, the General Partners used the proceeds of the sales of the participating interests for the purposes set forth in the Prospectus.

5. The members of the class on whose behalf this action is brought, or their predecessors in title (herein called "Participants") purchased their participating interests from one or another of the General Partners pursuant to the Prospectus.

6. Upon information and belief, at the time that each of the Participants purchased his participating interest from a

General Partner, he executed a written agreement in the form annexed as Exhibit 2 (herein called the "Investors Agreement"), except for the identity of the General Partners.

7. Pursuant to the Prospectus and the Investors Agreement, the Premises were to be managed by Tri-Management Company, a partnership composed of the General Partners, at no profit to Tri-Management Company so that the entire excess of rental income over building operating expenses was to enure to Associates as profit.

8. Upon information and belief, at a date unknown to the plaintiffs, Tri-Management Company ceased managing the Premises and thereafter the Premises were managed by First Republic Company, a partnership in which defendant Sands was a partner, and thereafter the Premises were managed by First Republic Corporation, a corporation in which Sands was an officer, director and controlling person.

9. Upon information and belief, in approximately May 1966, First Republic Corporation ceased managing the Premises and defendant F. S. Management undertook to manage the Premises.

10. Upon information and belief, Sands is an officer and director of F. S. Management and said corporation is wholly owned and controlled by Sands and members of his family.

11. Upon information and belief, in or about May 1966, Jerome Wishner and George Gewanter resigned as General Partners of Associates and defendant Sands remained as the sole general partner and agent for all Participants in Associates.

12. Upon information and belief, until the date set forth in Paragraph 11 hereof, the relationship between a General Partner and the Participants to whom he sold a participating interest was that of trustee and beneficiary and after that date the relationship between defendant Sands and all Participants was and is similarly trustee and beneficiary.

CLASS ACTION ALLEGATIONS

13. This action is brought against defendants Sands and F. S. Management by the plaintiffs, individually and as representatives of the class of persons consisting of the Participants.

14. The class is comprised of approximately 150 persons and it is therefore impracticable to bring them all before the Court.

15. The questions of law and fact common to the class are:

a) Whether Sands has mismanaged the affairs of Associates and breached the fiduciary duty he owed to the Participants by diverting assets and property of Associates to his own use or for his own benefit and to F. S. Management;

b) Whether F. S. Management participated in such unlawful activities and whether F. S. Management was the conduit through which said unlawful diversions occurred.

16. Plaintiffs will fairly and adequately protect the interests of the class since plaintiff Ethel Beckerman is a member

of a so-called Investors Committee which was elected at a general meeting of the Participants held on June 25, 1970 and plaintiff Abraham Beckerman is her husband.

17. Upon information and belief,

a) The plaintiffs have no individual interest in controlling the prosecution of the action;

b) This is the only action pending which embraces the claims contained herein;

c) It is desirable that the action be maintained in this Court which is convenient to all parties and witnesses; and

d) There are no difficulties likely to be encountered in the management of this action.

DERIVATIVE ACTION ALLEGATIONS

18. Plaintiffs bring this action in the right of the trust Associates because Sands is the sole trustee thereof and is alleged to have committed the wrongs enumerated herein and demand upon Sands to bring this action would be futile.

19. Plaintiffs were Participants at the wrongs complained of herein.

20. This action is not a collusive one to confer jurisdiction on a Court of the United States which it would not otherwise have.

BREACH OF FIDUCIARY DUTY

21. Upon information and belief, in contravention of the terms of the Investors Agreement and the Prospectus, Sands has caused Associates to pay management fees, in sums unknown to the plaintiffs, to First Republic Company, First Republic Corporation and F. S. Management.

22. Upon information and belief, since approximately May 1966, Sands has himself used and has permitted F. S. Management to use a substantial portion of the Premises for their own benefit and for purposes unrelated to the business of Associates without the payment of rent to Associates.

23. Upon information and belief, from time to time Sands caused Associates to pay legal fees to various attorneys and law firms for services rendered to Associates and has demanded and received forwarding fees from said attorneys and has represented other persons in transactions in which Associates was involved and has been paid legal fees by such persons.

24. Upon information and belief, Sands has caused Associates to pay various obligations of his own which were unrelated to the business of Associates.

25. Upon information and belief, Sands has caused the affairs and finances of Associates and F. S. Management to be intermingled so that Associates paid various expenses and obligations of F. S. Management.

26. Upon information and belief, Sands has used his position as trustee of Associates and as the person in control of

the management of the Premises to gain for himself various forms of gain, profit and income, all to the detriment and at the expense of Associates and the Participants.

WHEREFORE, plaintiffs demand judgment that:

a) The defendants Sands and F. S. Management account for all their acts and proceedings in the affairs of Associates; for the assets taken into their possession and the the deposition made thereof;

b) A receiver be appointed to take and hold the business assets and goodwill of Associates;

c) Plaintiff have such other and further relief as may be just and proper, together with the costs and disbursements of this action.

SCHWARTZ, KAUFMANN & SKLAVER

By: s/ Harvey M. Sklaver
A Member of the Firm

Attorneys for Plaintiffs
Office & P. O. Address
115 Broadway
New York, N.Y. 10006
Tel. No. (212) 964-7660

Agreement made as of the 29th day of June, 1961, between Jerome Wishner, residing at 2046 Oliver Way, Merrick, New York, hereinafter called "Agent" and others, hereinafter called "Participants".

WITNESSETH

WHEREAS, Times Square Associates owns the leasehold to the premises situated at 701-09 Seventh Avenue, also known as 165-73 West 47th Street, New York City, New York, and

WHEREAS, Times Square Associates is a New York Partnership, consisting of Ira Sands, Jerome Wishner and George Gewanter, hereinafter called "Associates", and

WHEREAS, by agreement, said Partnership has designated Ira Sands, Jerome Wishner and George Gewanter to act as Nominee for all of the partners, and to thereby each distribute to the Participants herein, their undivided one-third interest to the entire partnership asset, consisting of the beneficial ownership of the above leasehold, and

WHEREAS, the Agent and the Participants desire to establish the ownership of the leasehold, and to define their rights and obligations with respect thereto:

NOW, THEREFORE, in consideration of the covenants and promises herein contained, the parties mutually agree as follows:

1. A Partnership known as Times Square Associates has been formed for the purpose of owning the leasehold to the premises situated at 701-09 Seventh Avenue, also known as 165-73 West 47th Street, New York City, New York. Total capitalization shall be $720,000: Cash Participations $562,500 and Subordinate Participations for their interest in the purchase agreement, is registered at a face amount as follows: Ira Sands - $52,500 Units; Jerome Wishner - $52,500 Units; George Gewanter - $52,500 Units. Tax shelter shall be pro-rata among all Participants. Distribution at 10% per annum shall be made first to Full Participants, and the same distribution thereafter to Subordinate Participants. Further distributions, if any, shall be pro-rata to all Participants. In computing annual net profit, depreciation shall not be treated as an expense. However, capital improvements are an expense, said accounting to be on an accrual basis.

2. The original date of the leasehold herein referred to is February 1st, 1957, for a term (including renewal options) expiring on January 31st, 2020, and the annual ground rent to the fee owner is the sum of $45,000. The said leasehold contains an option providing for the purchase of the entire fee of the property, at any time up through February 28th, 1963. This option is based upon a formula, which on a graduated basis can require between $470,000 and $700,000 in cash, above the balance due on the first mortgage affecting the fee. The leasehold is subject to a mortgage on the fee, presently held by Loew's Theatres, Inc., originally in the amount of $1,725,000 and now reduced to approximately $1,524,250 requiring quarter annual payments (as additional rent) totalling $120,750 per year, which includes interest at 4 1/2%. When this mortgage matures on February 1st, 1972, the remaining balance will be $808,215.07. Prepayment is permitted on any

payment date without penalty. Upon the refinancing of this mortgage, from any sum in excess of the then balance due on said existing mortgage (above the expenses of refinancing) the first $350,000 shall be paid to the fee owner and any excess shall be divided equally between the fee owner and Times Square Associates. This will provide additional growth to the Participants assuming economic conditions permit such refinancing. Associates has no obligation whatever to pay the principal balance due on the mortgage upon maturity. This is the obligation of the fee owner alone. However, Associates shall continue to pay interest and principal on the refinanced mortgage not in excess of $120,750 per annum. The mortgage cannot be refinanced without the written consent of both the fee owner and Associates. If, prior to refinancing, Associates shall have exercised its option to purchase the fee, then all excess proceeds of refinancing shall belong to Associates. Should the leasehold be sold, from the net proceeds the Full Participants shall receive the first $562,500, with the next $157,500 distributed to the Subordinate Participants. Surplus monies will then be distributed as follows: 50% to the Full Participants and 50% to the Subordinate Participants.

THE AGENT SHALL:

(a) Collect rental income for the benefit of and distribute the same to the Participants, and shall not incur obligations or make decisions except in strict conformity with this agreement and further interest of all Participants.

(b) Distribute to each Participant herein proportionate distributions, commencing August 15, 1961, and monthly thereafter.

(c) Engage attorneys and accountants to keep accounts and records, and annually submit detailed reports to all Participants. Each Participant will receive a copy of a Certified Public Accountant's annual report, including an annual balance sheet and profit and loss statement.

(d) Maintain bank accounts for receiving and disbursing funds.

(e) Have no right or power to sell, mortgage or transfer the property, or to make or modify any mortgage, nor to dispose of any partnership asset without the consent of all Participants. However, if Participants owning 80% of the Agent's interest consent to such action, the Agent or his designee shall have the right to purchase the interest of a non-consenting Participant at original cost, less any capital repaid thereon, i.e., after deductions of those portions of cash distributions received by Participant which are treated as a return of capital, and after deductions of any proceeds Participant may have received from mortgage refinancing. This provision is included to prevent a small minority of Participants from interfering with the desires of the great majority.

(f) Allow partition proceedings or judicial sales only with the consent of all Participants.

(g) Allow Participants to have access to the books of account during business hours.

(h) In the event of the resignation, incompetency or other disability of either Ira Sands, Jerome Wishner or George Gewanter, the remaining Agents shall continue to act under this agreement. In such event, the retiring Agent and/or his committee or assigns, shall forthwith on demand, without cost or expense, execute, acknowledge and deliver, any and all documents or instruments necessary to effectuate the same.

(i) In the event Ira Sands, Jerome Wishner and George Gewanter shall all have resigned or become incompetant, their successor Agents shall then be designated by 80% of all the Participants, subject to all of the terms and provisions of this agreement.

(j) Bind his Participants, except as herein limited, and the Participants agree to indemnify him proportionately against liability arising by reason of his acting as Agent. The Agent will only incur personal liability for any action taken by him, solely in the event of his willful misconduct and gross negligence.

(k) All Participants, full and subordinate, shall have equal voting rights in proportion to the fractional number of Units held - there being no securities that are non-voting.

(l) Shall receive no compensation, whatsoever, for acting in the capacity as Agent herein.

4. The Partnership shall continue until January 31st, 2020, the termination date of the leasehold, or until the death of Ira Sands, Jerome Wishner or George Gewanter, with all partnership assets liquidated and distributed to the Participants, after payment of debts and liabilities of the Partnership, expenses of liquidation, and setting up required reserves. The surviving Agents, however, on behalf of all the Participants, shall have the right, not the obligation, to form a new Partnership, to engage in the same business as this Partnership and apply the assets and name to the Partnership. The assets shall thereupon be transferred and/or conveyed from the old Partnership to the new Partnership subject to the liabilities of creditors. The surviving Agents shall have the right to do all such things or cause all such things to be done, as shall be necessary or advisable for the formation of the new Partnership and the accomplishment of the foregoing, and shall thereupon act as Agent on behalf of all the Participants. Any Participant not desiring to be included, may so indicate and request the Agent or his designee, to proportionately purchase his interest, at original cost, less any capital previously repaid thereon.

5. Profits or losses of Associates, will be shared proportionately by all Participants, including the Sponsors. Losses, if any, will be borne by all Participants and the Sponsors, pro-rata in accordance with their respective investment. Although, any one Participant or Sponsor may be individually liable to a third party for the full amount of any liability of Associates, in such event, such Participant or Sponsor further would be entitled to be indemnified by the Partnership, subject to jurisdictional problems and other factors. The Participant or Sponsor further would be entitled to receive pro-rata contribution from all other Participants and Sponsors by way of reimbursement. Accordingly, each Participant or Sponsor may be assessed for his pro-rata share on contribution toward any claim against or debts of Associates. It is noted, however, that in the Sponsor's opinion, the following factors should be considered in mitigation of any possible liability: (1) The lease permits an assignment by Associates with no residual liability attaching to any of the Participants; (2) There is no bond, note or mortgage liability whatsoever; (3) Any

accident or other occurance will be covered by Workmans Compensation and adequate Casualty Insurance; and (4) Existing reserves and full permanent subordination of the Sponsor's distribution provide a more than ample Cushion to cover all operating expense, repairs, maintenance and other customary charges against the property. It is therefore the considered judgment of the Sponsors, that no practical liability will result to any Participant.

6. A Participant may transfer his entire participation to any individual of full age, provided the written consent of the Agent is obtained, same not to be unreasonably withheld. The transferee, of full age, must accept the transfer in writing, execute a new agreement, and duplicate originals of the transfer instruments on First Republic forms must be filed with the Agent together with the surrender and cancellation of this agreement, before the transfer becomes effective.

7. Upon the death of a Participant, any individual of full age designated in the decedent's will, or by his legal representative, may succeed to his interest, provided the consent of the Agent is obtained, same not to be unreasonably withheld. If no individual qualifies within eight months from the date of death, the remaining Participants, may proportionately purchase the interest of the decedent, at original cost, less any capital repaid thereon, as above set forth.

8. The Agent does not personally have the right or option to purchase or otherwise liquidate the interest of the Participants, or to increase the equity or control of the Agent, except as specifically provided herein.

9. The Agent may resign upon accounting to his successor for all funds received. He may be removed by the written direction of Participants owning at least 80% of the Participations of Associates.

10. This agreement shall be construed in accordance with the Laws of the State of New York, and any dispute or controversy, including but not limited to, the terms of this agreement, distribution to the Participants, their heirs, legal representatives, successors and assigns, or other persons claiming the right to receive such distribution, will be settled in New York City, in accordance with the rules of the American Arbitration Association, the costs thereof including legal, accounting and any and all expense of the Agent, in such proceeding or other legal action, to be borne by the Participant and/or prodeeds of such distribution, and the award thereon shall be binding upon the parties hereto, and may be entered as a judgment in any Court of proper jurisdiction. The foregoing, however, shall not be construed as a waiver by any Participant to institute an action for conversion of trust funds.

11. This agreement contains the entire understanding amongst the Participants and there are no representations or understandings, oral or written, which are not fully set forth or expressed herein. Receipt is acknowledged by the undersigned Participant of the official Prospectus.

12. All notices under this agreement shall be in writing, duly signed by the party giving such notice, and transmitted by certified mail, to the addresses hereinafter set forth. Notice of designation of a new address by any party must be given in writing as above set forth.

13. This agreement shall be binding upon all the Participants, their heirs, legal representatives, successors and assigns, and will be executed in counterparts, all of which when taken together will constitute one original.

IN WITNESS WHEREOF, each of the Participants has executed this agreement as of the day and year first above written.

Agent	375 Fifth Avenue, New York, New York
ABRAHAM BECKERMAN Name of Participant	1599 West 10th Street Address
Abraham L. Beckerman Signature of Participant	Brooklyn, 4 New York
ETHEL BECKERMAN Name of Co-Participant	1599 West 10th Street Address
Ethel Beckerman Signature of Co-Participant	Brooklyn, 4 New York

JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON.

One & One-Half Units - $7,500
UNIT OF PARTICIPATION

Signature Page for Participation Agreement of TIMES SQUARE ASSOCIATES.

THE FIRST REPUBLIC COMPANY

A-16

PROSPECTUS

TIMES SQUARE ASSOCIATES

THIS OFFERING IS LIMITED TO ADULT RESIDENTS OF THE STATE OF NEW YORK

Price Per Unit	Amount of Offering	Anticipated Distributions
$5,000 ($2500 half-units)	$562,500 (See page 7 for net proceeds)	10% Per annum payable monthly (Subject to conditions set forth in the Prospectus)

June 5, 1961—Approximate Date of First Sale to Public

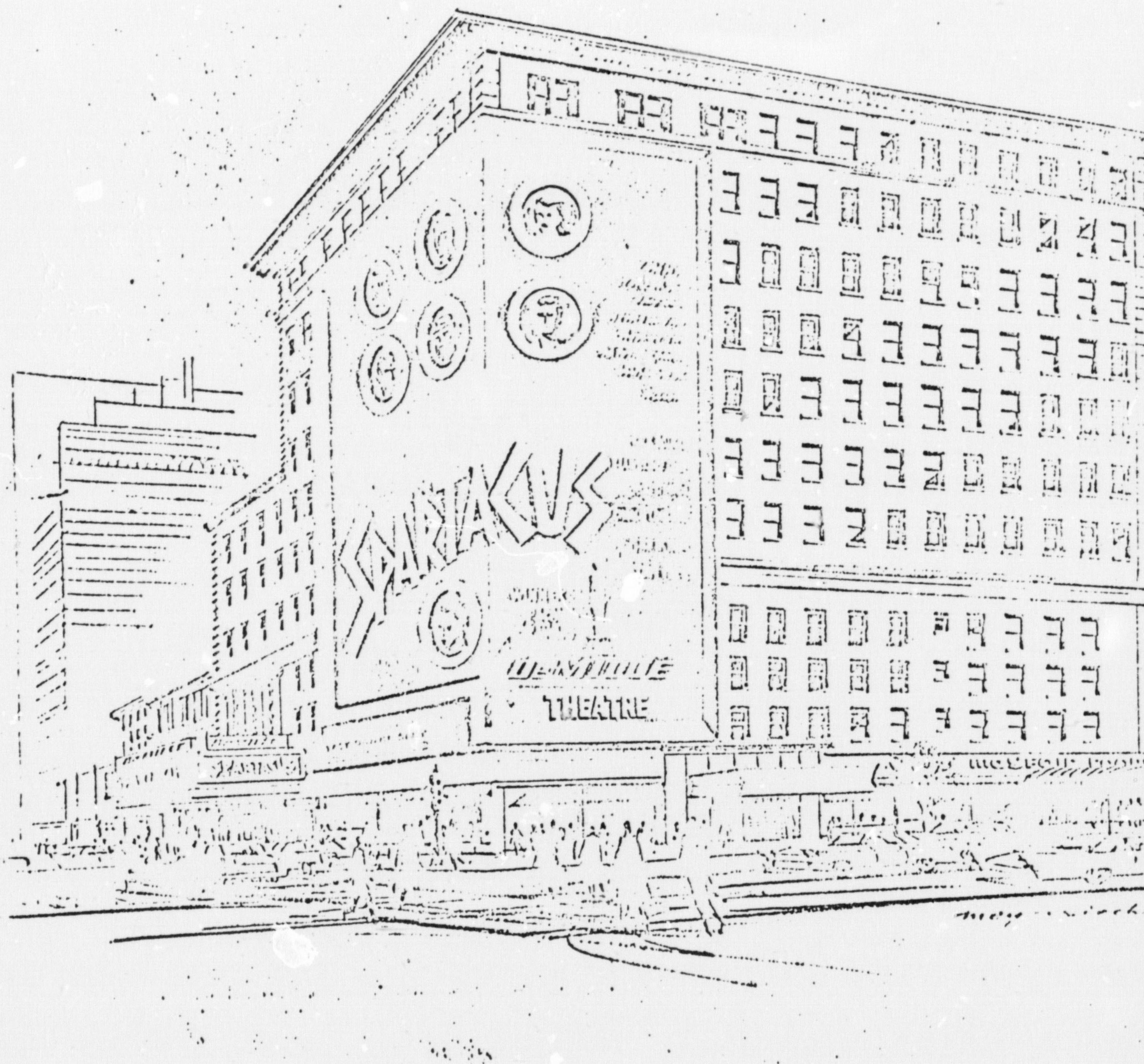
The Sponsors will act as Nominees for all Participants, and will distribute to each Participant their undivided one-third interest in the entire partnership asset, consisting of the beneficial ownership of the leasehold hereinafter described. All Participants, including the Sponsors, will share proportionately in the profits or losses of Associates, said losses, if any, not being limited to capital contribution. Reference is made to caption entitled, "Status of Purchasers of Participations".

UNDERWRITERS

THE FIRST REPUBLIC COMPANY
375 FIFTH AVENUE, NEW YORK 16, N. Y.
ORegon 9-7700

EXHIBIT- 2

THE FILING OF THIS PROSPECTUS WITH THE DEPARTMENT OF LAW OF THE STATE OF NEW YORK DOES NOT CONSTITUTE APPROVAL OF THE ISSUE OR THE SALE THEREOF BY THE DEPARTMENT OF LAW OR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.


SPARTACUS
THEATRE

THE DE MILLE THEATRE BUILDING

The leasehold property to be owned by Times Square Associates is of the renowned, centrally located office building *"The De Mille Theatre Building"*, at the corner of Seventh Avenue and West 47th Street, in the heart of Times Square, "The Entertainment Center" of New York City.

Of substantial size, on a plot extending 100 feet on Seventh Avenue and 160 feet on West 47th Street, this steel and masonry building houses the beautiful De Mille Theatre (named for Cecil B. De Mille) recently reconstructed and refurbished at a cost of approximately $300,000. Occupants of its 1,450 plush new seats have witnessed the premiere openings of many recent Hollywood great epics . . . presently showing is *"Spartacus"*, the Academy Award winning multi-million dollar film . . . The street floor contains a number of retail shops, including a branch of Barton's Candy Shops and a Statler Gift Shop.

The ten story office building towering above the theatre contains (in addition to the extensive theatre offices, lounges and balconies) more than 25,000 square feet of net rentable area, serviced by a recently installed self-service, automatic-electronic elevator. Since its construction in the 1920's the office building has always been considered a prime address in the entertainment field, catering almost exclusively to executive offices of companies servicing that profession, who enjoy the subway entrance in the building and access to express stations of all rapid transit facilities. Many of its tenants are AAA-1 rated and of national repute. For instance: Metro-Goldwyn-Mayer, Inc., maintains its Recording Division in the building and is presently moving in certain branches of its Television Division. United Telefilm Records occupies a complete floor for recording and executive offices. Larry Matthews, Inc., the widely known beauty chain, maintains a very large beauty and reducing salon catering almost exclusively to theatrical society. Trojan Films of California occupies substantial space and is presently moving its executive offices into this location. B. S. Moss Enterprises, owners and operators of numerous theatre properties, maintains executive offices in the building.

The entire De Mille Theatre is net leased to Saratoga Theatres, Inc., the lease being guaranteed by the parent company, Walter Reade, Inc., internationally known restaurant and theatre operating chain. Walter Reade, Inc., operates many motion picture houses, drive-in theatres and restaurants in and around the metropolitan area, the reported total annual operating revenue being in excess of $10,000,000. The entire De Mille Theatre was recently completely renovated with the installation of new luxurious push back seats, carpeting, lounge furniture, drapes, lighting, wide screen, projection equipment and an elaborate installation of heating and air conditioning systems. New lobbies and lounges were installed in addition to a beautiful new outdoor Marquee with recessed lighting. — — The De Mille Theatre is one of New York's finest "first run" theatres. — —

A portion of the corner of the office building and the roof are leased to Crossroads Outdoor Advertising Company, for outdoor sign advertising purposes. This sign is among the most prominent and visible in the Times Square area, since The De Mille Theatre Building, from its strategic corner, overlooks the entire Duffy Square, the widest and most open part of the Broadway-Seventh Avenue theatrical section.

. . . It is anticipated that following title closing, Associates will steam clean the entire exterior of the premises, redecorate the public corridors throughout, install new lighting fixtures and new kentile flooring in the corridors and a number of other miscellaneous improvements. These refurbishments will add to the beauty of the building and enhance its choice location. Several tenants have already spent substantial sums in redecorating their own premises and other tenant improvements are reported about to commence. . . .

The area encompasses all major New York City legitimate theatre and "first run" film theatres . . .

the entertainment mecca of the world. Comparable structures are the Paramount Building and the Loew's State Theatre Building. However, no formal independent appraisal has been obtained. Considering the scarcity of office space in the entertainment area for professionals who require a Times Square location, it is anticipated that The De Mille Theatre Building will continue to be well-tenanted for many years.

MAJOR CURRENT LEASES

a) LARRY MATTHEWS-CHARMODE BEAUTY SALON, INC. occupies a private entrance on 47th Street leading to an extensive salon installation, at a monthly rental of $800 to April 30, 1965, increasing thereafter to $850 per month to April 30, 1967. There is a security deposit of $1,100.

b) STATLER GIFT CENTER, INC. occupies a store at 707-09 Seventh Avenue at a monthly rental of $2,500 to January 31, 1969. There is a security deposit of $7,500.

c) RUBENSTEIN BROS. DRINK, INC. occupies a corner store at 701 Seventh Avenue as a Tropical Drink Shop. (This type of business enterprise is exceptionally lucrative in the theatrical area as evidenced by its substantial rent paid for a number of years.) The monthly rental is $4,346.66 with a security deposit of $10,000. The lease which originally expires March 31, 1962 has now been extended to March 31, 1972.

d) BARTON'S BONBONNIERE CORP. occupies the inside store at 705 Seventh Avenue under a sub-lease from Rubenstein Bros. Drink, Inc., at a monthly rental of $1,666 for five years expiring March 30, 1964. Barton has an option to extend its sub-lease to March 30, 1972.

e) METRO-GOLDWYN-MAYER, INC. occupies the entire sixth floor at a monthly rental of $1,916.66 pursuant to a lease expiring September 30, 1964, renewed in April 1961.

f) UNITED TELEFILM RECORDS, INC. occupies the seventh floor for offices and recording studios at a monthly rental of $650 with $1,300 as a security deposit. The lease expires October 31, 1964.

g) CROSSROADS OUTDOOR ADVERTISING CO. leases the sign space on the corner face of the building at a monthly rental of $2,222.22, expiring October 31, 1964. This tenant is, in addition, obligated to maintain and repair any damage to the entire roof of the office structure. (It is reported that Crossroads licenses the use of the signs to advertisers at approximately $5,000 per month.)

h) TROJAN FILM COMPANY occupies fifth floor space at a rental of $200 per month, with a security deposit of $200, expiring December 31, 1963. (Trojan Film Co. is now altering its own space to accommodate additional executives being brought into New York from its West Coast office.)

i) POLK REALTY CORP., a substantial theatre and realty operating company (part of B. S. Moss Enterprises), occupies the tenth floor for executive offices at a monthly rental of $750, with its lease expiring September 30, 1967.

j) THE MAYFAIR ROOM (169 West 47th Street Corp.) occupies a side street store as a restaurant, at a rental of $600 per month to May 31, 1965, increasing thereafter to $666.66 per month to May 31, 1967. There is a security deposit of $1,500.

k) SARATOGA THEATRES, INC. (Walter Reade, Inc.) occupies the entire De Mille Theatre at a rental of $12,000 per month to October 31, 1964, which thereafter increases to $12,500 per month to October 31, 1967, and thereafter to $13,000 per month to October 31, 1969 (with an option to renew to January 31, 1978 at a minimum rental of $13,000 per month plus one-half of any increase in the national price index). In addition, the theatre pays 45% of any increases in real estate taxes above $74,624, supplies its own heat, air conditioning and repairs. The lease is guaranteed

by the parent company, Walter Reade, Inc., as follows: to October 1961—$144,000; to October 1963—$120,000; to October 1965—$96,000; to October 1967—$72,000; to October 1968—$48,000; to October 1969—$26,000; and on any renewal of lease—$50,000.

The building is presently and for many years has enjoyed an occupancy rate of more than 98.62%. The approximately 25,000 square feet of executive offices and studios in the office section of the building are rented at an average of $2.27 per square foot, although more recently signed leases are bringing higher rentals. The $2.27, in the opinion of the Sponsors (without an outside examination), is well below the current rate for both comparable and new structures in the midtown area. Statistics of occupancy rates for comparable buildings in this area are not available to the Sponsors. There is no new office building construction within a radius of two blocks from The De Mille Theatre Building.

. . . It is anticipated that growth will result from future increases in the rentals of the office space. Of the $348,000 total rent roll in the entire building, there is merely $4,800 in vacancy. Further growth by way of an increase in distribution may develop from the future rental of this space. Growth may also develop as a result of automatic rent increases, contained in certain of the leases, as aforesaid. . . .

The assessed valuation of this property for 1960/1961 is: land: $1,500,000—building: $300,000—total: $1,800,000, which is annually reviewed by the City of New York.

THE PARTNERSHIP AND THE PURCHASE

Times Square Associates (herein called Associates) is a New York General Partnership composed of Ira Sands, Jerome Wishner and George Gewanter, as General Partners and Sponsors, with offices at 375 Fifth Avenue, New York City.

The leasehold, which is non-cancellable by either party, is presently owned by Marburt Holding Corp., a New York Corporation, with its principal office at 40 Vanderbilt Avenue, New York City. The Sponsors are in no way connected with the seller, and none of the parties has acted as real estate broker or received any commission. The General Partners will not be bonded and there are no existing law suits against them. The fee of this property is presently owned by Philip Levine, residing at 1475 Walton Avenue, Bronx, New York and Sadie Koeppel and Nat Koeppel, both residing at 1442 East 22nd Street, Brooklyn, New York.

Associates, on behalf of and for the sole benefit of the Investors who will become Participants therein, has contracted, on April 21, 1961, to purchase the leasehold to The De Mille Theatre Building, located in the heart of the Times Square entertainment district. The total cash cost of the leasehold, free and clear of any leasehold mortgages, to be paid to Marburt Holding Corp. as Seller, is the sum of $425,000. The Sponsors have deposited $35,000 as a guarantee of performance of the purchase contract and upon performance of same, said $35,000 will be returned to the Sponsors by the Sellers. Title will be taken in the name of Times Square Associates and is scheduled to close on or before July 21st, 1961, at the option of Associates. The original date of the leasehold is February 1, 1957 for a term expiring January 31st, 1978, said lease containing a first renewal option to January 31st, 1999, and a second renewal option to January 31st, 2020. The property will be completely operated at actual cost by Tri-Management Company, a New York Partnership, consisting of Ira Sands, Jerome Wishner and George Gewanter, under a management contract. Tri-Management Company will pay to the fee owner an annual rent of $45,000, plus all items of additional rent specified in the lease and will, of course, receive all income from the property and pay therefrom all operating expenses, service all Participants by making monthly distributions, and remit the quarterly balance to Associates. The said management contract is non-assignable and is on an at will basis, and may be cancelled at the option of either Associates or Tri-Management Company, with no liability enuring to either party. Associates has an option, at their sole discretion, to purchase the entire fee of the property, at any time up through February 28th, 1963.

This option is based upon a formula set forth in the lease, which on a graduated basis can require between $470,000 and $700,000 in cash above the balance due on the first mortgage. (No provision is included in this offering for the purchase of the fee.) At any time prior to February 28th, 1963, Associates may or may not find it advantageous to exercise this option to purchase the fee, thus maintaining complete flexibility of action.

MORTGAGES AND MORTGAGE REFINANCING

The leasehold is subject to a mortgage on the fee, held by Loew's Theatres, Inc., originally in the amount of $1,725,000 and now reduced to approximately $1,524,000, requiring quarter-annual payments (as additional rent) totalling $120,750 per year which includes interest at 4½%. On closing of title, the balance of the said mortgage will be approximately $1,511,000. When this mortgage matures on February 1st, 1972, the remaining balance will be $808,215.07. Pre-payment is permitted on any payment date without penalty.

> Upon the refinancing of this mortgage, from any sum in excess of the then balance due on the existing mortgage (above the expenses of refinancing) the first $350,000 shall be paid to the fee owner and any excess shall be divided equally between the fee owner and Associates. (This will provide additional growth to the Participants assuming economic conditions permit such refinancing.)

Associates has no obligation whatever to pay the principal balance due on the mortgage upon maturity. This is solely the obligation of the fee owner alone (Messrs. Levine and Koeppel and Mrs. Koeppel). However, Associates shall continue to pay interest and principal on the refinanced mortgage not in excess of $120,750 per annum. The mortgage cannot be refinanced without the written consent of both the fee owner and Associates.

Of course, if prior to refinancing, Associates shall have already exercised its option to purchase the fee, then all excess proceeds of refinancing shall belong to Associates.

TERMS OF THE OFFERING

a) This offering is being made by The First Republic Company, as Underwriter, the sole partners being Ira Sands and Jerome Wishner. It has agreed to use its best efforts to complete the offering as Agent for Times Square Associates.

b) Participations are available in Units of $5,000, in Half-Units of $2,500, or multiples thereof. These Participation Units are unsecured and are an equity position.

c) A deposit of 10% will be required for any Participation. All deposits and full amounts will be held in Trust in a Special Escrow Account in the Irving Trust Company, Empire State Building, to be utilized only in connection with the actual consummation of the transaction.

d) Title closing is presently scheduled for July 21, 1961, but may be advanced at Associates' option. The balance of each Participation will be payable at the office of The First Republic Company upon written notification on or before June 21, 1961 or earlier if closing should be advanced.

e) If for any reason title does not close by July 21, 1961, or a reasonable adjourned date thereafter (a period of approximately 30 days), all monies received will be immediately repaid in full without interest, by the Sponsors.

f) The first cash distribution to the Participants is scheduled to commence within 45 days after title closing and monthly thereafter.

g) Each Participant will receive a copy of an Independent Certified Public Accountant's annual report including an annual balance sheet and profit and loss statement.

h) Offers to purchase Participations will be accepted only from Investors of full age, who are bona fide residents of the State of New York.

CAPITALIZATION

The partnership is capitalized at $720,000, of which $562,500 in cash will be obtained from the sale of Participation Units, to the public, no cash having been invested by the Sponsors, other than the aforesaid deposit of $35,000 as a guarantee of contract performance. No current trading market exists for the Units being offered herein. For their interest in the purchase agreement, the Sponsors will receive $157,500 face amount of subordinated units of participation, said valuation having been arbitrarily set by the Sponsors. The $562,500 cash proceeds of the offering will be used as follows: a) $425,000 to be paid to the seller on title closing; b) $51,250 estimated for closing adjustments, prepaid insurance, prepaid real estate taxes, rent, security, insurance, fuel, prepaid mortgage expenses, water, sewer rental, title insurance, recording fees, professional fees, appraisals, printing, clerical, postage, and all miscellaneous expense of the offering. Should such expenses aggregate more than such amount, the excess will be supplied by the Sponsors at no charge to Associates; if less, the difference will be retained by the Sponsors; c) $56,250 to The First Republic Company for Underwriting fees and for Representatives' commissions in connection with the sale and distribution of the Units, which amounts to 10% of the cash offering based on an expected 100% sale of such Units; d) $30,000 to be deposited by Associates as a reserve fund to be maintained in a separate trust account, for immediate renovation and refurbishment, balance to be retained by Associates for future contingencies.

STATUS OF PURCHASERS OF PARTICIPATIONS

Messrs. Sands, Wishner and Gewanter, as nominees, will enter into a Participation Agreement with Investors whereby Messrs. Sands, Wishner and Gewanter will each be Agent for and represent one-third of the Participants in their equity ownership.

The Participants will own the particular Agents' one-third equity interest in the partnership in proportion to their fractional respective contributions. Some of the salient provisions of the agreement are:

a) Distribution if available at 10% per annum payable monthly shall be made first to full Participants, and the same distribution payable monthly thereafter to subordinate Participants (Sponsors). Further distributions shall be pro rata to all Participants. In computing annual net profits, depreciation shall not be treated as an expense; however, capital improvements are an expense; accounting to be on an accrual basis.

b) Profits or losses of Associates will be shared proportionately by all Participants including the Sponsors. Losses, if any, will be borne by all Participants and the Sponsors, pro rata, in accordance with their respective investment. Although any one Participant or Sponsor may be individually liable to a third party for the full amount of any liability of Associates, in such event, such Participant or Sponsor would be entitled to be indemnified by the Partnership, subject to jurisdictional problems and other factors. The Participant or Sponsor further would be entitled to receive pro rata contribution from all other Participants and Sponsors by way of reimbursement. Accordingly, each Participant or Sponsor may be assessed for his pro rata share of contributions toward any claim against or debts of Associates. It is to be noted, however, that in the Sponsors' opinion, the following factors should be considered in mitigation of any possible liability: (1) The lease permits an assignment by Associates with no residual liability attaching to any of the Participants; (2) There is presently no bond, note or mortgage liability whatsoever; (3) Any accident or other occurrence will be covered by Workmen's Compensation and adequate Casualty Insurance; and (4) Existing reserves and the full and permanent subordination of the Sponsors' entire distribution provide a more than ample cushion to cover all operating expense, repairs,

maintenance and other customary charges against the property in the opinion of the Sponsors. It is therefore the considered judgment of the Sponsors that no practical liability will result to any Participant.

c) The agent may not sell, exchange, mortgage or transfer the property nor make or modify any mortgage, nor dispose of any asset, without the consent of 80% of the Participation Units. In the event of at least an 80% consent as aforesaid, the Agent or his designee shall have the right to purchase the interest of a non-consenting Participant, at original cost, less any capital repaid thereon, i.e., after deduction of those portions of cash distribution treated as a return of capital, or proceeds from mortgage refinancing. This provision is designed to prevent a small minority from interfering with the desires of the majority of the Participants. Should the leasehold be sold, from the net proceeds the Full Participants shall receive the first $562,500, with the next $157,500 distributed to the Subordinate Participants. Surplus monies will then be distributed as follows: 50% to the Full Participants and 50% to the Subordinate Participants.

d) Except as so limited, the Agent may bind his Participants, and the Participants agree to indemnify him proportionately against liability arising by reason of his acting as agent, except for willful misconduct and/or gross negligence.

e) The Agent may resign upon accounting to his successor for all funds received. He may be removed by written direction of Participants owning at least 80% of the Agent's interest.

f) If the Agent is removed, resigns or is unable to act, he will be succeeded by one of the persons named as successors in each agreement. If no such designee qualifies, the owners of at least 80% of the Agent's interest shall elect a new agent.

g) The partnership shall continue until January 31st, 2020, the termination date of the leasehold, or until the death of Ira Sands, Jerome Wishner or George Gewanter, with all partnership assets liquidated and distributed to the Participants, after payment of debts and liabilities of the partnership, expenses of liquidation, and setting up required reserves. The surviving agent, however, on behalf of all the Participants, shall have the right, but not the obligation, to form a new partnership, to engage in the same business as this partnership and apply the assets and name of the partnership. The assets shall thereupon be transferred and/or conveyed from the old partnership to the new partnership subject to liabilities of creditors. The surviving agent shall have the right to do all such things or cause all such things to be done, as shall be necessary or advisable for the formation of the new partnership and the accomplishment of the foregoing, and shall thereupon act as agent on behalf of all the Participants. Any Participant not desiring to be included may so indicate and request the agent or his designee to proportionately purchase his interest, at original cost, less any capital previously repaid thereon.

h) A Participant may transfer his interest to any individual of full age, provided the consent of the Agent is obtained, same not to be unreasonably withheld. Upon the death of a Participant, any individual of full age designated in the decedent's will, or by his legal representative, may succeed to his interest, provided the consent of the Agent is obtained, same not to be unreasonably withheld.

i) The Sponsors do not have the right or option to purchase or otherwise liquidate the interest of the Participants, or to increase the equity or control of the Sponsors, except as set forth in this prospectus.

j) The Agent shall receive no fees for acting in that capacity.

k) The Participation Agreement shall be construed in accordance with the laws of The State of New York, the costs thereof including legal, accounting, and all expense of Agent to be borne by the Participant and/or the proceeds of such distribution, and any controversy will be settled in New

York City, in accordance with the rules of the American Arbitration Association.

l) All Participants have equal voting rights in proportion to the fractional number of units held—there being no securities that are non voting.

BIOGRAPHICAL

IRA SANDS, South End, Woodmere, New York, is a graduate of Columbia University School of Law and has specialized in the field of real estate law and taxation since 1944.

JEROME WISHNER, Oliver Way, Merrick, New York, has been active in the Investment Profession for the past 15 years.

As Executive Vice-Presidents of The First Republic Company, both Mr. Wishner and Mr. Sands have been in charge of a substantial professional staff, specializing in Realty Investments and Estate Planning.

In the field of Investment Planning, they have been particularly active over the many years in the creation of conservative opportunities in real property. Some of the most recent of such investments include, among others, participation in THE ALLSTATE INSURANCE BUILDING, New York City . . . VELVEX MID-CITY PARKING CENTER in the Theatre District of New York City . . . THE ENGINEERS BUILDING, Chicago, Illinois . . . THE KORVETTE BUILDING at Grand Central in New York City . . . THE BEACON BUILDING, Wichita, Kansas . . . WALTHAM ENGINEERING AND RESEARCH CENTER in Waltham, Massachusetts . . . THE FAIRFAX BUILDING, Kansas City, Missouri . . . IMPERIAL SQUARE in Hempstead, New York . . . and other prestige properties.

GEORGE GEWANTER, Rica Lane, Woodmere, New York, is a graduate of St. John's University School of Law and since 1946 has specialized in the field of real estate law and taxation. As a practicing attorney in the State of New York, Mr. Gewanter has frequently appeared before various State and Federal Courts and is a member of the Bar of the Supreme Court of the United States. A General Counsel and Associate of The First Republic Company for some years, Mr. Gewanter has been closely associated with the purchase, financing and operation of large real estate entities.

It is anticipated that the property will be efficiently managed and operated in view of the vast experience of the Sponsors in the acquisition, financing development and operation of real estate investments. In this fashion, Associates will from inception have a completely integrated staff, experienced in working together as a team.

LEGAL AND TAX OPINIONS

Legal matters pertinent to the purchase and all other matters pertaining thereto, including the legality of the Participations and matters relating to this offering, have been passed upon by Gewanter & Sands, Esqs., 375 Fifth Avenue, New York 16, New York, said Messrs. Gewanter and Sands being two of the Sponsors of this offering.

The status for Federal Income Tax purposes of the Partnership has been passed upon by Mitchell Miller, Esq., 27 Woodland Road, Valley Stream, New York. In his opinion, under new regulations issued by the U. S. Treasury Department effective for taxable years beginning after December 31, 1960, the partnership will be treated as a Partnership for Federal Income Tax purposes and will not be taxed as a Corporation.

DOCUMENTS

The descriptions of various documents in this Prospectus are necessarily brief but fair summaries. For full terms of all documents, reference is made to the documents themselves which may be examined at the offices of The First Republic Company, 375 Fifth Avenue, New York City.

LEASE EXPIRATION TABLE FOR THE BUILDING AS OF MAY 1961 (2)

Year	% Gross Rental Value
Statutory	1.17%
Monthly	.65
1961	2.15(1)
1962	1.61
1963	1.87
1964	16.54
1967	7.43
1968	2.07
1969	50.10
1972	15.03
Vacant	1.38
	100.00%

Note 1. The occupants of the space where leases will expire in 1961 have occupied their offices in this building for many years. These leases will expire towards the end of the year and renewal leases are presently being negotiated.

Note 2. This table was prepared by Charles J. Cohl, C.P.A. based upon his personal examination of the leases.

CURRENT RENT ROLL
AS OF MAY 1, 1961

Location	Tenant	Annual Rental
Basement—707-9 7th Ave.	Charmode Beauty Salon, Inc. (Larry Mathews)	$ 9,600.00
Store—707-9 7th Ave.	Statler Gift Center, Inc.	30,000.00
Store—701-03 7th Ave.	Rubinstein Bros. Drinks, Inc.	32,160.00
Store—705 7th Ave.	Barton's Bonbonniere Corp.	20,000.00
Store—173 W. 47th St.	James Gross	2,250.00
Store—171 W. 47th St.	Peter Nicas	2,250.00
Store—169 W. 47th St.	The Mayfair Room, Inc.	7,200.00
Signs	Crossroads Outdoor Adv.	26,666.64
Office—2nd Floor	Larry Mathews, Inc.	1,920.00
Office—3rd Floor	Vacant—Estimated Rental Value	1,800.00
Office—4th Floor	Vacant—Estimated Rental Value	3,000.00
Office—5th Floor	Lotte Jamel D/B/A Trojan Film Company	2,400.00
Offices—6th Floor and One-Half of 9th Floor	Metro-Goldwyn-Mayer	28,548.00
Office—7th Floor	United Telefilm Records, Inc.	7,800.00
Office—8th Floor	Birch Holding Corp.	1,800.00
Office—8th Floor and One-Half of 9th Floor	John J. McNamara	5,600.00
Office—10th Floor	Polk Realty Corp. (Subsidiary of B. S. Moss Enterprises, Inc.)	9,000.00
Theatre	Saratoga Theatres, Inc. (Walter Reade, Inc.)	144,000.00
Store—165 W. 47th St.	D'Amore Restaurant, Inc.	7,200.00
Offices	Seymour M. Simmons	4,101.00
		$347,295.64

Note 1: This table was prepared by Charles J. Cohl, C.P.A., based upon his personal examination of the leases.

ESTIMATED CASH AVAILABLE FOR PARTNERSHIP DISTRIBUTION
AND
ESTIMATED PARTNERS TAXABLE INCOME

		Total	Per $5,000 Unit
Income			
Rental Income (Current Rent Roll)	$342,495		
Electricity Charged to Tenants	19,031		
Water Charged to Tenants	2,170		
Total Income		$363,696	
Operating Expenses			
Rent	$ 45,500		
Mortgage Payments	120,750		
Real Estate Taxes	75,514		
Water and Sewer	2,462		
Wages	11,993		
Gas, Electric and Steam	24,810		
Materials and Supplies	473		
Repairs and Maintenance	2,890		
Elevator Maintenance Contract	420		
Cleaning Contracts	1,680		
Insurance	2,645		
Meter Charges	269		
Utility Taxes	494		
Union Welfare and Sundries	310		
Payroll Taxes	638		
Total Operating Expenses		$290,848	
Net Available Income for Distribution		72,848	$505
Less:			
Amortization of Leasehold	$ 32,879		
Depreciation of Elevator	2,000	$ 34,879	
Net Taxable Income		$ 37,969	$264

These statements were prepared by Charles J. Cohl, C.P.A. on the basis that the operations of the Property will continue as reflected by the operational statements included in this Prospectus annualized and adjusted for non-recurring expenses where appropriate and for proposed amortization and depreciation. The foregoing projection of estimated cash available for partnership distribution is dependent on variable factors, including but not limited to economic conditions, proper management, and prevailing competition.

While no representation is made herein that these estimates will be fulfilled, it is the opinion of the Sponsors, based on their experience with comparable properties which they presently own and manage, that these statements are a fair estimate of the future operations of the property. Said opinion is further based upon a physical examination of the property personally performed by the Sponsors.

It is anticipated that Associates will establish a reserve fund of approximately $30,000 (based on a 100% sale of units) to be derived from the proceeds of the underwriting. After title closing, certain renovation and refurbishments to the building will be immediately commenced. On completion of such improvements, Associates will retain surplus monies, if any, from said fund as an additional reserve and cushion for future contingencies.

Purchase price has been allocated upon the basis of $20,000 for elevator with the balance of the purchase price being allocated to the Leasehold.

Depreciation on the elevator has been calculated on an estimated remaining useful life of 15 years, using 150% Declining Balance Method resulting in an effective rate of 10% per annum.

Purchase Price of the Leasehold has been amortized over the remainder of the first term of the lease or 16½ years. No advance ruling has been obtained from the Internal Revenue Service regarding this method of amortization. The Internal Revenue Service has the right to challenge this method and to contend that the cost of the leasehold should be written off over the entire term of the lease. Such contention, if sustained, would have the effect of lessening the so-called tax shelter by making a smaller percentage of the annual distributions non-taxable, but would spread the same over a longer period of time.

TAX TREATMENT OF ESTIMATED CASH AVAILABLE FOR PAYMENT TO PARTNERS

For each $5,000 of original cash investment it is estimated that the cash payments to Partners for the first five years of operations of the Partnership will be treated for Federal Income Tax purposes as follows:

Years	Total Cash Distributions	Portion Constituting Taxable Income	Portion Constituting Return of Capital	Percent Not Reported As Ordinary Income
1st	$500.00	$263.68	$236.32	47.26%
2nd	500.00	265.06	234.94	46.99
3rd	500.00	266.31	233.69	46.74
4th	500.00	267.44	232.56	46.51
5th	500.00	268.45	231.55	46.31

In succeeding years, the portion constituting taxable income will increase slightly as the depreciation allowance decreases each year, under the declining balance method, however after the seventeenth year, all distributions will be wholly taxable as ordinary income.

The foregoing is based on presently existing and applicable provisions of the United States Internal Revenue Code and Regulations of the Internal Revenue Service, and subject to such provisions not being repealed or materially amended.

In the event of sale of the property, the capital gain realized by each partner will be determined by the excess of the partner's share of the proceeds over his basis, "basis" being defined as original investment less amount of distributions received constituting a return of capital.

This table was prepared by Charles J. Cohl, C.P.A., said computations being based upon the statement of "Estimated Partners Taxable Income", as set forth on Page 12, adjusted for changes in annual depreciation allowances.

STATEMENT OF INCOME AND EXPENSES (A)
FOR THE PERIODS INDICATED

	January 1, 1961 to April 26, 1961	January 1, 1960 to December 31, 1960	January 1, 1959 to December 31, 1959
INCOME			
Rental Income (Includes Water Charges) ...	$113,663.17	$341,208.44	$309,475.80
Electric Energy Sold	6,541.28	16,870.85 (B)	16,327.68
TOTAL INCOME	$120,204.45	$358,079.29	$325,803.48
OPERATING EXPENSES			
Rent	$ 15,166.68	$ 45,500.04	$ 45,500.04
Mortgage Payments	40,250.00	120,750.00	120,750.00
Real Estate Taxes	25,320.00	75,514.68	74,588.34
Wages	3,997.83	12,847.33	12,723.65
Water and Sewer Charges	926.81	2,869.30	1,949.47
Gas and Electric and Steam	10,627.31 (C)	24,654.60	22,610.40
Materials and Supplies	194.46	522.06	388.64
Repairs and Maintenance	1,069.50	2,285.57	2,388.98
Elevator Maintenance	304.75	564.00	396.00
Cleaning Contract	338.00	1,680.00	1,680.00
Insurance	2,499.79 (D)	2,522.94	2,586.55
Meter Charges	89.76	375.88	364.08
Utility Taxes	164.77	663.56	497.50
Union Welfare and Sundries	103.50	343.60	425.00
Payroll Taxes	212.86	569.47	634.00
TOTAL OPERATING EXPENSES	$101,266.02	$291,663.03	$287,482.65
NET OPERATING PROFIT	$ 18,938.43	$ 66,416.26	$ 38,320.83

(A) These statements have been prepared by Charles J. Cohl, C.P.A. from information submitted by the seller and have been adjusted for certain expenses incurred by the Seller in the temporary operation of the theatre prior to the current lease with Walter Reade, Inc. and for expenses incurred in the negotiation of the lease. These expenses have no historical significance in depicting the operations of the property.

(B) As a result of new metering surveys conducted during the latter part of 1960, the income from tenants' charges for electric energy and water have been increased. Estimated charges as shown on the Estimated Statement of Income and Expenses appearing elsewhere in this Prospectus reflect these anticipated increases.

(C) Gas, electric and steam expense shown for the period from 1/1/61 to 4/26/61 includes steam charges for the cold winter months and must be properly weighted in annualizing the operating figures.

(D) Insurance expense shown for the period from 1/1/61 to 4/26/61 includes full annual premiums on all major policies and has not been prorated.

GENERAL NOTICE

This Prospectus does not constitute an offer to sell, or a solicitation of an offer to buy any Participations referred to herein, in any State other than the State of New York. This offering is only available to persons of full age, bona fide residents of the State of New York, and only on the basis of the information and statements contained in this Prospectus.

Information or representations not referred to herein, or in various instruments mentioned in this Prospectus, must not be relied upon. This Prospectus does not omit any material fact or contain any untrue statement of a material fact.

Participations are available in,
UNITS of $5,000
HALF-UNITS of $2,500

THE FIRST REPUBLIC COMPANY

375 FIFTH AVENUE, NEW YORK, N. Y.
ORegon 9-7700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

39913

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, a New York trust, similarly situated and in the right of Times Square Associates,

Plaintiffs,

72 Civ. 3188

-against-

IRA J. SANDS, F. S. MANAGEMENT CORP., and TIMES SQUARE ASSOCIATES,

Defendants.

MEMORANDUM

- -X

APPEARANCES:

SCHWARTZ, KAUFMANN & SKLAVER, ESQS.
115 Broadway
New York, New York 10006
Attorneys for Plaintiffs
Of Counsel: HARVEY M. SKLAVER, ESQ.

BOTEIN, HAYS, SKLAR & HERZBERG, ESQS.
200 Park Avenue
New York, New York 10017
Attorneys for Defendants
Of Counsel: ALVIN H. SCHULMAN, ESQ.
RICHARD CASHMAN, ESQ.

LASKER, D.J.

Ethel and Abraham Beckerman ("the Beckermans"), two participants in a real estate syndicate, Times Square Associates ("Associates"), bring this diversity action directly on behalf of themselves and all other participants and derivatively on behalf of Associates. They allege breach of trust by defendant, Sands, and diversion of Associates' funds by him to defendant, F.S. Management Corp.

Defendants move to dismiss for lack of jurisdiction. They contend that the Beckermans' non-derivative claim must be dismissed for lack of the jurisdictional amount (28 U.S.C. §1332) and that the derivative claim must be dismissed for lack of diversity. The Beckermans move for a class action determination and for the appointment of a receiver.

I. Motion to Dismiss.

The Beckermans oppose dismissal on several grounds. As to the non-derivative suit, they argue that the requisite jurisdictional amount exists because 1) the suit is either a true or a hybrid class action and, therefore, the claims of the individual members of the class may be aggregated or 2) the amount of the Beckermans' claim taken alone exceeds $10,000. As to the derivative suit,

it is claimed that either diversity exists because the suit is a class action or, if diversity is absent, the claim can nevertheless be entertained as pendent to the direct suit.

The Beckermans' position is founded on the thesis that Associates is a partnership, that the action is essentially to compel an accounting by the managing partner, and that joinder of all partners is compulsory and aggregation of their claims permissible. A corollary to the claim that Associates is a partnership is that a derivative action may be brought on its behalf.

Defendants contend that Associates is not a partnership and that, consequently, neither of the above positions is tenable. If no partnership exists, they argue, then the Beckermans must establish the existence of the jurisdictional amount by their individual claim. This, defendants contend, the Beckermans cannot do.

We turn to the central issue whether Associates is a partnership. The starting point of the investigation must necessarily be the Uniform Partnership Law. That act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit". Partnership Law §10(1). The act further provides that "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that

he is a partner in the business." Id. at §11(4). However, it is clear, if not from the statute itself, at least from its judicial gloss that a partnership agreement is a contract, which cannot come into being without the understanding and consent of all the contracting parties. See, e.g., Manning v. Whalen, 259 App. Div. 490, 20 N.Y.S. 2d 364 (1940); Graziani v. Rohan, 195 N.Y.S. 2d 156 (S. Ct. 1959), rev'd on other grounds, 10 App. Div. 2d 154, 198 N.Y.S. 2d 383, aff'd, 8 N.Y. 2d 967, 204 N.Y.S. 2d 346, 169 N.E. 2d 8 (1960). Such consent is required in part because formation of a partnership constitutes every partner the agent of the partnership for the purpose of its business. Partnership Law §20(1). Accordingly, "[w]hether two or more persons are partners, as between themselves, is determinable chiefly by a reference to their own intention." Salter v. Ham, 31 N.Y. 321, 327 (1865). See also Kent v. Universal Film Mfg. Co., 200 App. Div. 539, 193 N.Y.S. 838 (1922); Fullam v. Peterson, 21 N.Y.S. 2d 797 (S. Ct. 1940).

With these rudimentary principles in mind, we turn to the agreement itself to determine whether the parties intended to bring into being a partnership and whether they succeeded in doing so. There is no doubt that initially Associates was a partnership consisting of defendant Sands and two other persons (hereinafter

called "the partners"). After the formation of their partnership, the partners entered into separate agreements with approximately one hundred and fifty other persons (hereinafter called "the participants"), by which the latter were to invest in the partnership business and to share in its profits and losses. The original partners other than Sands subsequently withdrew from the business. The agreement which is in question here (Complaint, exhibit 2) is that entered into between the partners and the participants, including the Beckermans. It should at this point be noted that each participant entered into a separate agreement with one of the partners, all of the agreements being identical. A careful perusal of these agreements leads us to conclude that a partnership was not and could not have been created by them.

There are a number of reasons for this conclusion. First, it is noteworthy that the agreements are not designated as partnership agreements and at no time refer to the participants as partners. To the contrary, a careful distinction is drawn between the original partners, who are nominated throughout either "partners" or "agents", and the participants, who are not. The documents, in fact, at one point refer to the interest of the participants as "securities", a term which is entirely misplaced in a standard partnership agreement.

(Complaint, exhibit 2, par. (k)). Second, the partnership of which the agreements speak, consisting of the three original partners, is terminable on the death of any one of the three original partners (id. at par. 4.). Upon the death of a participant, however, his interest passes to his heirs with the consent of the one partner or "agent" with whom he contracted. (Id., par. 7). Furthermore, a participant can transfer his interest with the consent of the same partner. (Id., par. 6.) Third, it is clear from the agreements that although each of the three original partners is an agent of the other "partners", none of the participants is authorized to act as such. Fourth, the agreements which, as noted above, were entered into separately by each participant with one partner state that they are to "be binding upon all the Participants." (Id., par. 13.) However, they do not purport to bind the two other partners and their signatures do not appear thereon. Accordingly, although the knowledge and consent of the three original partners to the profit-sharing scheme may be inferred, it is not expressly indicated in the separate agreements. Finally, although the agreements provide that they are to be construed in accordance with the laws of the State of New York, they do not refer to the Partnership Law.

In light of these considerations, we believe that it is highly probable that the parties did not intend the agreements to create a partnership and it is certain that, if they did intend to do so, they failed, because the association which they created did not comply with applicable law. In particular, the fact that none of the partners consented by the agreement to the agency of the participants (as provided by Section 20 of the Partnership Law) and that the participants could transfer their interests with the consent of only one of the partners is inimical to the concept of a partnership, which requires the consent of all the partners to the admission of a new partner, since in a partnership each partner is the agent of the other partners.

Plaintiffs contend, however, that aggregation is proper even if Associates is not a partnership, since all the participants derive their rights from identical contracts with the original partners and all have identical claims against defendants. We do not believe that this represents a correct reading of applicable law. As the Court stated in <u>Snyder v. Harris</u>, 394 U.S. 332, 335 (1969), aggregation is permitted "in cases in which two or more plaintiffs unite to enforce a <u>single</u> title or right in which they have a <u>common</u> and <u>undivided</u>

interest" (emphasis added). Here, each participant has rights deriving from his separate contract. This fact critically distinguishes the case from those relied on by the Beckermans.[1/]

Since aggregation is impermissible, jurisdiction over the non-derivative suit can be sustained only if the Beckermans' individual claim satisfies the jurisdictional amount. They argue that it does, because the jurisdictional requirement is met both by their claim for compensatory damages and by their demand for punitive damages.

The rule governing dismissal for lack of the jurisdictional amount was clearly stated by the Supreme Court in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938):

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." Id. at 288-89 (footnotes omitted).

Accordingly, if there is any possibility whatever that the Beckermans could recover either compensatory or punitive damages in excess of ten thousand dollars, dismissal is improper.

Taking the question of punitive damages first, we note that punitive damages may provide the basis for jurisdiction unless "it is apparent to a legal certainty from the complaint that [plaintiffs] could not recover... sufficient punitive damages to make up the requisite [amount]." Bell v. Preferred Life Assurance Society, 320 U.S. 238, 240 (1943). In the leading case of Walker v. Sheldon, 10 N.Y. 2d 401, 233 N.Y.S. 2d 488 (1961), the New York Court of Appeals stated that "there may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involves high moral culpability." Id. at 405, 223 N.Y.S. 2d at 491. Expressing no view on the merits, but taking, as we must on this motion, the allegations of the complaint as true, we cannot say that it would be impossible for the Beckermans to satisfy the requirements of the New York rule and to recover punitive damages. There is no doubt that the New York standard is an extremely high one, making it difficult indeed for plaintiffs to recover punitive damages in this state. On the other hand, the federal standard for dismissal is also very high, and on the balance here we believe that it precludes dismissing the action.

The motion to dismiss the non-derivative suit for lack of the jurisdictional amount must therefore be

denied. This disposition makes it unnecessary to determine whether the Beckermans' claim for compensatory damages also exceeds ten thousand dollars.

We turn to the motion to dismiss as it applies to the derivative suit. Defendants claim that the derivative suit must be dismissed for lack of diversity under the rule enunciated in United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965). However that may be, the fact that jurisdiction exists over the non-derivative suit would give this court pendent jurisdiction over the derivative suit, if such a suit can be maintained, regardless of the existence of diversity. Our decision that Associates is not a partnership, however, mandates the conclusion that a derivative suit is impossible, there being no entity on behalf of which to sue. Plaintiffs' counsel has not cited any cases, nor has our research discovered any which would permit a contrary conclusion. Accordingly, the derivative claim must be dismissed.

II. Motion To Appoint a Receiver.

Although we have concluded that it cannot be determined as the record now stands that punitive damages cannot be granted as a matter of law, we nevertheless deny the motion for an appointment of a receiver. The appointment of a receiver would be a drastic remedy, not only

in superseding the activities of the ordinary managers, but in imposing a perhaps burdensome and unnecessary expense on Associates itself, at least in the event that Associates does not ultimately prevail on the merits. Furthermore, although the allegations of the complaint supplemented by the affidavits supporting the motion are sufficient to prevent our concluding that punitive damages cannot be granted as a matter of law, they are not sufficient to prove, as they stand, a level of conduct on the part of the defendants which would justify the appointment of a receiver. Moreover, the individual defendant is an attorney at law subject to the special control of this court and amenable to professional discipline. If supervision of the operations of Associates pending the disposition of this litigation is necessary, it can in the circumstances be brought about by less expensive, formal and demeaning arrangements than a receivership, to the benefit of all concerned. For these reasons, the motion for the appointment of a receiver is denied without prejudice to the plaintiffs to move that the individual defendant be ordered to file with the court, at suitable intervals, such reports, prepared in accordance with generally accepted business or accounting principles, as will disclose the financial status and operations of Associates.

III. Motion For a Class Action Determination.

Plaintiffs move for a class action determination under Rule 23(a) and (b)(1)(B), (2) and (3) (Fed. R. Civ. P.). Defendants concede that class action treatment would be appropriate under Rule 23(a) and (b)(3), except that they claim that joinder of all members of the proposed class is not impracticable.

The putative class consists of the approximately one hundred and fifty participants who invested in Associates. This number is sufficiently large to make joinder of all members impracticable. Korn v. Franchard Corp., 456 F. 2d 1206, 1209 (2d Cir. 1972) (district court ordered to allow class action for a class of seventy). We agree with the parties that the other prerequisites of Rule 23(a) are satisfied, and we so find.

We turn to the question which of Rule 23(b)'s sub-sections is most appropriate to this action. Plaintiffs propose Rule 23(b)(1)(B), (2) and (3). We agree with plaintiffs that 1) "adjudications with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests" (Rule 23(b)(1)(B)); 2) "the party opposing the class has

acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" (Rule 23(b)(2)); and 3) "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, .. a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (Rule 23(b)(3)). Accordingly, we determine that the putative class meets the requirements of Rule 23(b)(1)(B), (2) and (3).

The consequence of finding that the class satisfies the requirements of Rule 23(b)(1)(B) and (2), as well as (3), is that the notice to the class will therefore not contain a provision allowing members to opt out, as it would if only 23(b)(3) were applicable (Rule 23(c)(2)). Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966).

Notice must be sent to all proposed members at plaintiffs' expense. The notice submitted by plaintiffs is hereby approved with the following changes. First, all references to the participants as partners and to Associates as a partnership must be changed to conform with the findings of this decision. Second, a sentence

should be inserted to indicate that the class action determination does not reflect any opinion held by the court of the merits of the case.

Defendants' motion to dismiss the non-derivative claim is denied; the motion is granted as to the derivative claim. Plaintiffs' motion for the appointment of a receiver is denied; their motion for a class action determination is granted.

Submit order on notice.

Dated: New York, New York
October 11, 1973.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTE

1. The Beckermans rely principally on Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), cert. denied, 396 U.S. 1037 (1970) and Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969). In both cases, the Court of Appeals made it clear that the plaintiffs did not have individual claims which they could assert, but rather that the only claims belonged to the class.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

Plaintiffs,

-against-

IRA JAY SANDS and F.S. MANAGEMENT CORP.,

Defendants.
- -X

#40921

72 Civ. 3188

MEMORANDUM

APPEARANCES:

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LASKER, D.J.

Ethel and Abraham Beckerman (the Beckermans), two participants in a real estate syndicate, Times Square Associates (Associates), bring this diversity action for breach of trust by defendant Ira J. Sands and F.S. Management Corp., which he controls. By Memorandum dated October 11, 1973, we granted the Beckermans' motion for a class action determination permitting them to sue on behalf of themselves and other participants in Associates. The Beckermans move, pursuant to Rule 56(c), Federal Rules of Civil Procedure, for summary judgment on the issue of liability. Defendants (hereafter jointly referred to as Sands), cross-move, pursuant to Rules 12(b)(1) and 12(h)(13), for an order striking from the complaint all class action allegations and for judgment on the pleadings dismissing the class action alleged in the complaint. Sands also cross-moves, pursuant to Rule 56(b), Federal Rules of Civil Procedure, for summary judgment dismissing the complaint for lack of subject matter jurisdiction.

I.

Sands' motions may be disposed of quickly. In essence, Sands seeks to reargue the issues raised and determined by our October 11, 1973 Memorandum. At that

time we decided that the Beckermans' individual claims satisfied the $10,000. jurisdictional amount and that the putative class met the requirements of Rule 23(b)(1)(B), (2) and (3). Even assuming a motion to reargue our earlier determinations were proper at this late date, which it is not, Sands merely reiterates arguments we rejected on the class action motion, to the effect that the Beckermans' claims do not satisfy the jurisdictional minimum. Accordingly, Sands' motions are denied.

II.

The Beckermans claim that Sands as a general partner of Associates, stood in a fiduciary position toward the investors in Associates; that Associates' offering prospectus dated June 5, 1961, the participation agreement between investors (limited partners) and the three general partners of Associates, and a contract for management of the building (Associates' principal asset) dated May 1, 1961, establish that the General Partners were to manage the building and the syndicate without compensation to them; while in fact Sands improperly charged Associates for management and administration fees and engaged in certain other conduct in breach of his fiduciary and contractual duties to investors.

The factual background is undisputed. Associates is a New York real estate syndicate organized in 1961 to acquire the long term net lease to a commercial structure in New York City, and to derive income from the operation of the building. At the time Associates acquired the building in 1961, it was comprised of three general partners: Sands, Jerome Wishner and George Gewanter. The partners sold participations to the public by means of a prospectus, reserving to themselves certain assets and interests in the building as a promotor's fee.

The prospectus stated:

> "The property will be completely operated at actual cost by Tri-Management Company, a New York Partnership, consisting of Ira Sands, Jerome Wishner and George Gewanter under a management contract ... [with Associates] ... The said management contract is non-assignable and is on an at will basis, and may be cancelled at the option of either Associates or Tri-Management Company, with no liability enuring (sic) to either party."

The management contract between Tri-Management and Associates, dated May 1, 1961, provided that, effective as of the date of Associates' acquisition of the leasehold, Tri-Management (a partnership composed of the same three general partners as Associates) would (1) collect rents (2) rent vacant space (3) supervise employees (4) operate

and maintain the building and (5) negotiate and prepare all necessary leases. The contract was non-assignable and terminable at will by either party. Finally, it provided, "There will be no fee or charge to [Associates] whatsoever for the aforesaid services." In short, both the prospectus and the management contract indicate that Associates' general partners promised that for so long as they managed the building (as principals of Tri-Management) they would do so without compensation.

The legal relations of the parties were embodied in one other document, the participation agreement. Each investor signed such an agreement with one of the three general partners of Associates (each of whom originally owned a one-third interest in Associates) at the time of his purchase of a participation. By the agreement, each investor designated the partner from whom he had bought his participation his "agent" for purposes of administering his investment. The duties of the "agent" were specified, in relevant part, as follows. To:

> "(a) Collect rental income for the benefit of and distribute the same to the Participants, and shall not incur obligations or make decisions except in strict conformity with this agreement..."
>
> (b) Distribute to each Participant herein proportionate distributions...

(c) Engage attorneys and accountants to keep accounts and records, and annually submit detailed reports to all Participants.

* * *

(l) shall receive no compensation, whatsoever, for acting in the capacity as Agent herein."

The Agreement also specified certain limitations on the power of the Agent to sell, mortgage or transfer any partnership asset and provided that in the event of resignation or other disability of any of Sands, Wishner or Gewanter, "the remaining agents shall continue to act under this agreement." If all three resigned, their successors were to be designated by 80% of the participants. Finally, the Agreement contained a merger clause stating that the Agreement constituted the entire understanding among the parties, and an acknowledgement of receipt of the Prospectus by the participant.

By virtue of the Participation Agreement and the management contract, Sands, Wishner and Gewanter occupied two roles vis-a-vis investors in Associates. By the Participation Agreement they assumed the rule of administrative officers of Associates as a profit-making real estate syndicate. As partners of Tri-Management, they obligated themselves to Associates, as a business entity, to conduct the physical operation and management of the

building. In effect, therefore, Associates subcontracted the job of managing agent of the building to Tri-Management.

In accordance with its management contract with Associates, Tri-Management managed the building until the end of 1962. At that time, the First Republic Corporation of America, principally owned and controlled by Sands, Wishner and Gewanter, took over management of the building, charging Associates a management fee of 1% of gross income. This arrangement continued until about May, 1966 when Sands, Wishner and Gewanter ended their business association. Wishner and Gewanter then left both the management of Associates and First Republic. First Republic ceased to manage the building, but pursuant to the terms of the Participation Agreement detailed earlier, Sands remained at Associates as sole general partner.

As of July 1, 1966, Sands took over management of the building and, on behalf of Associates, made demand on First Republic for the management fees it had received from Associates. The 1967 financial report of Associates notes these charges as a receivable to Associates: "The sum of $5,772 due from the First Republic Corporation of America, represents the excess of receipts over disbursements, during their term of management, which was dis-

continued July 1, 1966." (Exhibit "1968" annexed to SKLAVER affidavit).

On August 10, 1966, Sands sent a letter to all investors, which stated:

> "I am continuing as sole General Partner of Times Square Associates, without fee or salary to me as such General Partner in accordance with the terms of the original Participation Agreement."

The August 10 letter also stated that because First Republic refused to continue the management of the building, "it is now necessary that Times Square handle its own administrative requirements and distributions to the Investors."

Sands, acting as general partner of Associates, managed the building himself until February, 1967, when he organized F.S. Management Company, wholly owned by himself and members of his family. The annual financial statements of Associates for the years 1967-1972 reflect substantial annual charges for "management fees," "administrative charges," and "leasing commissions" paid to F.S. Management by Associates. These facts are undisputed.

III.

The Beckermans allege that the various charges for these three categories of expenses were improperly paid by

Associates, since Sands was obligated by the Prospectus, the Participation Agreement and his letter to investors of August 10, 1966, to act entirely without compensation (apart from his interest in the building reserved at the time of syndication) as the general partner of Associates and either to manage the building himself without charge, or pay for someone else to do so.

The Beckermans claim that Sands' charges to Associates for these services (through F.S. Management) constitute both a breach of his agreement with the investors and a breach of the fiduciary duty reposed in him as general partner ("Agent," in the words of the agreement). For the reasons stated below, we conclude that (1) Sands was, by virtue of the Participation Agreement and representations of the Prospectus, bound to administer the syndicate without fee or compensation, for so long as he remained as agent; (2) that although he was under no contractual duty to manage the building indefinitely, his fiduciary position as Agent for the syndicate precluded him from management of the building for compensation in the absence of clear and specific authorization from Associates' investors.

Both the representations in the Prospectus and the terms of the Participation Agreement indicate that Sands

was obligated to administer Associates without fee or compensation for so long as he remained as Agent. The Participation Agreement provides that the "Agent" (Sands, Gewanter or Wishner or their successors) "Shall receive no compensation whatever, for acting in the capacity as Agent herein" (emphasis added). The Agreement also provides for the Agent's resignation "upon accounting to his successor for all funds received;" that the partnership shall continue until the year 2020; and that any remaining Agents "shall continue to act under this agreement" in the event of the resignation of the others. Since it is undisputed that Sands did remain Agent from the time of Wishner's and Gewanter's resignation in 1966 until the present, we conclude that Sands is accountable to Associates for all charges collected from Associates for administering the syndicate which accrued to him personally or through F.S. Management.

The question of fees for managing the building is more troublesome. The entire thrust of the Participation Agreement contemplates the definition of the respective rights and obligations of the promotors, as general managers of the syndicate, and investors. There is no mention whatever of the management of the building itself anywhere in the agreement. The duties of the Agent are

explicit and detailed in 12 paragraphs, none of which refer to the physical operation of the building. Finally, the fact that the agreement contains a merger clause forecloses the judicial implication of a building management contract.

Nor does the Prospectus indicate any obligation of the original Agents to manage the building without compensation for the duration of the partnership. On the contrary, both the original building management contract between Associates and Tri-Management, and the Prospectus' representations with regard to that contract clearly provide that the agreement could be terminated at will by either party without notice. Consequently, although Tri-Management initially undertook to manage the building without fee or compensation it was free, by the clear terms of the contract, to discontinue its services at any time.

IV.

It does not follow, however, that once Tri-Management and its successor, First Republic, terminated their building management agreements, Sands could, consistently with his duties as a fiduciary of Associates' investors, begin to charge Associates for services he had previously performed without compensation as a partner of Tri-Manage-

ment and First Republic.

Whether Sands' relationship to investors is likened to that of partner, co-adventurer, corporate officer or trustee, he was, by virtue of the prospectus and Participation Agreement, a fiduciary of Associates' investors. As sole managing partner of Associates after 1966, he was the only person charged with, and duly empowered to, administer the syndicate. In such circumstances he was bound to refrain from any conduct which actually or potentially conflicted with his duty to investors. See Meinhard v. Salmon, 249 N.Y. 458 (1928), Pearlman v. Feldman, 219 F.2d 173 (2d Cir. 1955), Lichtyger v. Franchard Corp., 18 N.Y.2d 528 (1966).

Although Sands concedes he was a fiduciary, he argues (1) that his charging of reasonable building management fees was consistent with his position and (2) that in any event the charges were disclosed in the Annual Reports distributed to investors and, in effect, ratified by them. Both arguments lack merit. Although Sands was not obligated to manage the building after termination of the management agreement with First Republic and Associates would in any event have had to pay someone to manage the building, we believe that elementary principles of fiduciary duty precluded Sands (or F.S. Management) from

managing the building for compensation without the express and explicit consent of investors. Meinhard v. Salmon, supra. A fiduciary is of course entitled only to such compensation for which the governing instrument provides. In re Bostwick's Trust, 189 Misc. 331 (1947), Matter of Schell, 53 N.Y. 263 (1873). It is undisputed that no agreement between Sands and investors provided for compensation to Sands for managing the building and that Associates' investors never explicitly consented to Sands' arrangements through F.S. Management.

In managing the building for compensation Sands placed himself in a situation in which his own interests might seriously conflict with those of Associates' investors. For example, the Tri-Management contract to manage the building _without_ compensation, to which Sands was a party and which was terminable at will, _might_ have been terminated later than it was, absent Sands' prospects of managing it subsequently for compensation. Or the fees charged by Sands, through F.S. Management, however reasonable, _might_ have been higher than those charged by an outside manager. We, of course, have no opinion whatever on the question whether the building management contract would _in fact_ have been terminated later than it was, or whether the fees were in fact reasonable, nor, of course,

of Sands' good faith in his relations with investors. Indeed, such considerations are irrelevant to the issue presented: a fiduciary is not permitted to speculate on the possible ratification of prior conduct which may with hindsight be found to be proper. See Meinhard v. Salmon, supra. Instead, the relevant inquiry is whether he was under a duty fully to disclose to investors the possibility of a conflict of interest and permit *them* to pass on the propriety of the contemplated action.

As sole general partner of Associates Sands was clearly under such a duty of disclosure before engaging in any self-dealing, whether or not in good faith. It is undisputed, however, that the *only* disclosure to investors of the nature of Sands involvement in the management of the building after 1965 was contained in the Financial Statements and accompanying notes annually distributed to investors.

In our view, the statements and notes fall far short of disclosing the complex relationships among Sands, F.S. Management and Associates. The 1967 statement includes charges for leasing commissions and administration fees without a breakdown of the charges or an indication of the recipient. Note 5 to the statement reads:

> "The management of the property and administration are conducted from

formerly vacant space in the Partnership's building without rental charge, where the general partner also conducts certain of his own activities."

The 1968 financial settlement includes charges for leasing commissions, building administration and partnership administration again without elaboration. The 1969 Statement includes charges for "Management charges - rentals," leasing commissions, professional fees, and "administrative charges - participants," without explanation other than Note 6, which states:

> "Management charges, administrative charges and leasing commissions were paid to a corporation, an officer of which is also the agent of the participants. These charges were based on rates prevalent for these services."

The 1970, 1971 and 1972 statements contain charges in the same categories as the 1969 statement. A note to each of the statements for those years reads:

> "Management charges, administrative charges and some leasing commssions were paid to a corporation, an officer of which is also the agent of the participants. These charges were based on rates prevalent for these services. This corporation is also a tenant of Times Square Associates."

We conclude that Sands did not adequately disclose to investors the nature and extent of his possible

conflict of interest with regard to the management of the building, as distinguished from the syndicate.

V.

Plaintiffs make several other claims flowing from Sands' alleged abuse of his fiduciary position. The first claim is that Sands used space in the building to carry on his personal business and professional activities without payment of rent to Associates, that he permitted F.S. Management to do so as well, and that both Sands and F.S. Management derived sublease rental payments from the use of their space by third parties.

A fiduciary commits a breach of trust when he uses trust property for his own benefit. Marian v. Mariani, 276 App. Div. 205, (1949), Everett v. Phillips, 288 N.Y. 227 (1942). It is undisputed that Sands used space in the building for his personal activities without payment of rent to Associates, but Sands claims that this was fully disclosed in the notes, as quoted above, to the Annual Reports for 1967 and 1968. We disagree. The notes do not indicate who managed the property, the extent of the space, its rental value, or the proportion of personal and business use of the space. Because Sands was entitled to space in the building for the conduct of Associates' business, but not for his own business, we conclude that

he must account for all space he used, or permitted to be used, for either purpose with allocation to be made at the time of an inquest.

As to plaintiffs' claim that between 1966 and 1968, F.S. Management (through Sands) used space in the building without payment of rent, Sands' general denial is insufficient to create a genuine issue of fact under Rule 56(e), Federal Rules of Civil Procedure, and indeed is controverted by the notes to the financial statements. It is undisputed that, beginning in 1969, F.S. Management began to pay at least some rent, the reasonableness of which the parties dispute. Since as we conclude below, Sands and F.S. Management must account for all monies paid by Associates to Sands or F.S. Management, we need not consider the reasonableness of the rent here, except to the extent that we now find that F.S. Management was obligated to pay the full value of the space it used in the building, or caused to be used by third parties, since it entered into no agreement with Associates for the use of space without payment.

VI.

Plaintiffs' next claim relates to legal fees in connection with Associates' affairs which Sands allegedly

either received himself, or caused to be paid to his law firm or other attorneys, who allegedly returned to Sands a portion of such fees in some instances. Although Sands' 9(g) statement generally denies all these claims, the mere denial is insufficient to create a genuine issue of fact under Rule 56(e). Indeed, Sands' memorandum in opposition concedes that Sands' law firm did receive legal fees for "extensive professional services;" the financial statements include charges of over $91,000. for professional fees without naming the recipient. Moreover, Sands' affidavit in opposition details his legal services to Associates (at paragraphs 36-41) and admits that he received a $650. fee from his former law partner who billed Associates directly for work done by him, although Sands denies that any forwarding fees were paid to him.

It is clear under New York law that a fiduciary is not entitled to extra compensation for legal services rendered by him. Collier v. Munn, 41 N.Y. 143 (1869), Lent v. Howard, 89 N.Y. 169 (1882). The rationale for the rule is simple: a fiduciary who employs himself cannot properly perform an essential part of his duties, to see that no improper charges are made. Sands' claim that the Participation Agreement permits the payment of

attorneys fees to an Agent of Associates does not support his position since the agreement states: [The agent shall] ... (c) <u>engage</u> attorneys and accountants ... (emphasis supplied). Such language is not consistent with the Agent's employment of himself as attorney. We conclude that Sands must account for all legal fees paid by Associates and received by him, directly or through his law firm, or any other law firm.

Another category of legal fees paid by Associates (the identity of the recipient is unclar) relates to charges paid to prosecute an action instituted by Sands against the Beckermans for conversion of stolen records of Associates and defamation of Sands' character. Sands does not dispute that legal fees for this action were charged to Associates.

The Partnership Agreement does not explicitly cover the situation in which Associates sues as plaintiff; it provides only for indemnity of the Agent against liability incurred in his official capacity. However, the Agreement also states that: "[The Agent shall] (a) ... not incur obligations or make decisions except in strict conformity with this agreement and further interest of all Participants." Sands contends that the principal cause of action in his suit against the Beckermans was the conversion claim, and consequently that legal fees

were properly charged to Associates; the Beckermans argue that the principal cause of action was the defamation claim; that Sands began the suit for the purpose of harrassing them in their investigation of Associates' affairs; and that the legal fees were incurred not to vindicate any rights of Associates, but of Sands personally. Since we find that, at the least, a substantial portion of the lawsuit against the Beckermans (the defamation claim) protected no legal interest of Associates, Sands must account for all legal fees paid by Associates in the prosecution of the lawsuit, with allocation of fees properly chargeable to Associates to be determined at the inquest.

Plaintiffs' next claim relates to a $5,000. legal fee Sands received from the owner of the building and underlying land (Associates owned only a long-term leasehold) for negotiating a mortgage on the building in 1971. Thereafter, litigation arose between the owner and Associates regarding the allocation of the mortgage proceeds between them. These facts are undisputed.

It is elementary that a fiduciary may not use his position to derive an individual benefit or profit, irrespective of his good faith. Matter of Fulton, 253 App. Div. 494 (1938), Re Bradley's Estate, 143 N.Y.S.2d 264 (1955),

<u>Bosworth v. Allen</u>, 168 N.Y. 157 (1901), <u>Pyle v. Pyle</u>, 137 App. Div. 568, 572 (1910). Nor may a fiduciary place himself in a position where his own interests are or might be in conflict with his duties. <u>City Bank Farmers Trust Co. v. Cannon</u>, 291 N.Y. 125 (1943), <u>Matter of Ryan</u>, 291 N.Y. 376, 407 (1943).

We think it clear from the undisputed facts that there was at least the <u>possibility</u> of a conflict of interest in Sands' representation of the fee owner in connection with the mortgage. Page 6 of the Prospectus indicates that under the lease between Associates and the fee owner, the mortgage servicing costs were to be borne by Associates as part of its leasehold rental payments, up to a maximum of $120,750. of such costs, with the owner to pay any excess. Consequently, the larger the mortgage (with concommitantly higher servicing costs), the larger the net proceeds to Associates would be. This possibility placed Sands in a conflict situation since Associates' interest in the largest possible mortgage might conflict with the fee owner's possible desire for a smaller one resulting in lesser interest and amortization costs. Accordingly, we find that the fee was improper and Sands must account for it.

In view of the foregoing, Sands' motions are

denied and the Beckermans' motion for summary judgment on the issue of liability is granted. We defer consideration of the Beckermans' motion to remove Sands as agent for investors. The parties are instructed to prepare for a conference with the court to discuss the method of accounting by Sands and F.S. Management and the further progress of the case.

It is so ordered.

Dated: New York, New York
June 28th, 1974.

MORRIS E. LASKER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

41465

Plaintiffs,

72 Civ. 3188

-against-

MEMORANDUM AND ORDER

IRA JAY SANDS and F.S. MANAGEMENT CORP.,

Defendants.
- -X

APPEARANCES:

SCHWARTZ, KAUFMANN & SKLAVER, ESQS.
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LASKER, D.J.

Defendants move to reargue our Memorandum and Order dated June 28, 1974, denying their motion for summary judgment dismissing the complaint for lack of subject matter jurisdiction. They claim that the Beckermans and the class they represent have not alleged and cannot in good faith amend their complaint to allege that each member of the class (numbering approximately 150) has suffered damages of $10,000. or more, as required by Zahn v. International Paper Co., 414 U.S. 291 (1973).

We originally denied defendants' motion for summary judgment because there were not sufficient facts in the record to establish that the requisite jurisdictional amount was lacking. However, the record as more fully developed in defendants' moving papers on the present motion indicated the possible absence of jurisdiction. At oral argument on the current motion, we requested further submissions from the parties on that limited issue, in accordance with the rule that when allegations of the jurisdictional amount are challenged by the defendant, the plaintiff must support them by competent proof. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1935); Arnold v. Troccoli, 344 F.2d 842 (2d Cir. 1965); Ulster v. Kiamesha Concord, Inc., 232 F.Supp. 393 (S.D.

N.Y. 1964). Because of the existence in the record of new factual material requested by the court, we treat the present motion as a renewed motion by defendants for summary judgment.

I.

To begin, we find unpersuasive the Beckermans' renewed assertion that this is a "true" class action to enforce a single right or title to a common and undivided interest, and that aggregation should be permitted. By Memorandum of October 11, 1973,[1/] we rejected the argument that Associates is a partnership; that this action is essentially to compel an accounting by the managing partner; and that consequently this is a derivative action brought in the right of Associates permitting the aggregation of claims of the investor-"partners". However, we (1) granted the Beckermans' motion for a class action as to the non-derivative claims and (2) denied defendants' motion, pursuant to Rule 12, Federal Rules of Civil Procedure, to dismiss the complaint for lack of the jurisdictional amount, because it could not be said, on the basis of the pleadings, that it was a "legal certainty" that plaintiffs could not recover the requisite damages. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

The Beckermans now contend that Associates is a trust, and that because the interests of the investor-"beneficiaries" are joint or common, aggregation should be permitted on this new theory, citing Brotman v. Meyers, 41 A.D. 2d 547, 339 N.Y.S.2d 735 (1973).

The Brotman plaintiff was one of 302 investors in a real estate syndicate who paid $10,000. to a defendant, the record owner of the syndicate property, for a participating interest. Defendant delivered to plaintiff a "certificate of ownership" to evidence the investment. The court found that the certificate constituted a declaration of trust within the meaning of §5-703, N.Y. Gen.Oblig. Law (which requires conveyances and contracts concerning real property to be in writing) and, therefore, in compliance with the Statute of Frauds, entitling Brotman to demand an accounting.

The Beckermans' reliance on Brotman is misplaced. Even assuming Associates to be a trust, which it is not, the propriety of aggregation does not hinge on the type of entity involved but on the nature of the right asserted. Aggregation is permissible only when the class claims constitute a single and integrated right against the defendant, Snyder v. Harris, 394 U.S. 332, 336-7 (1969), citing Pinel v. Pinel, 240 U.S. 594, 596 (1916); see

also Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 314-315 (1st Cir. 1969). No such right is asserted here. Although the complaint frequently refers to Associates as a "trust" and purports to seek equitable relief (receivership and an accounting), it is plain from plaintiffs' various submissions that this suit is brought in substance to recover compensatory damages, i.e. funds alleged to have been diverted from Associates by defendants, together with punitive damages, and to distribute them pro rata to Associates investors. Compare Weiss v. Sunasco, Inc., 316 F.Supp. 1197, 1201 (E.D. Pa. 1970); Houck v. Travelers Insurance Co., 356 F.Supp 729 (E.D. Pa. 1973); Sigel v. General Development Corp., 59 F.R.D. 577, 581 (M.D. Fla. 1973). The assertion of a right to an accounting with a view to distribution of damages is not grist for a "true" class action: Each plaintiff has separate rights deriving from his separate contract with defendants, and by its terms each contract here provides an individual right to sue the syndicate management. (See Exhibit 2 annexed to Sands affidavit, October 13, 1972).

II.

The practical effect for the present case of Snyder v. Harris, supra, and Zahn v. International Paper

Co., supra, is that damages exceeding $10,000. must be alleged not only by the Beckermans, but each class member. Such allegations are not present. The complaint (Paragraph 1) alleges only that "[t]he matter in controversy, exclusive of interests and costs, exceeds the sum of $10,000." Putting aside the defects in the complaint, we turn to the "merits," i.e. the question whether plaintiffs could amend their complaint to allege in good faith the requisite jurisdictional amount.

The plaintiff class is composed of 154 investors. Consequently, assuming each class member has an equal interest in the syndicate (the Beckermans do not suggest otherwise). 2/ plaintiffs must allege minimum total damages in excess of $1,540,000 (154 investors x $10,000) for any investor to recover the jurisdictional amount of $10,000. The affidavit of plaintiffs' counsel, dated September 4, 1974, sets forth plaintiffs' computation of alleged actual damages totalling $326,405. Defendants dispute the amount of provable actual damages but because there is no indication that the allegation is made in bad faith we accept arguendo plaintiffs' computation as the proper basis on which to calculate the jurisdictional amount.

In addition to $326,000. actual damages, plaintiffs claim punitive damages, but do not specify the

amount sought. As we noted in our October 11, 1973 Memorandum, to recover punitive damages plaintiffs must allege and prove not only that a fraud has been committed, but that the fraud was "aimed at the public generally, is gross and involves high moral culpability." Walker v. Sheldon, 10 N.Y.2d 401, 405; 233 N.Y.S.2d 488, 491 (1961); see also DeMarasse v. Wolf, 140 N.Y.S.2d 235, 238-9 (1955); Szekely v. Eagle Lion Films, 140 F.Supp. 843 (S.D.N.Y. 1956), aff'd 242 F 2d 266, cert. denied, 354 U.S. 922 (1956).

The present record indicates that it is highly unlikely that plaintiffs will be able to recover punitive damages sufficient to satisfy the $1,540,000. jurisdictional amount, roughly five times the actual damages claimed. Nevertheless, we are unable to say it is a legal certainty that they cannot do so: The New York State Court of Appeals recognized claims for punitive damages in actions for fraud only thirteen years ago, see Walker v. Sheldon, supra, and as yet the New York Courts have not sufficiently delineated the requisite degree of culpability to establish such claims, or suggested a rule of thumb as to the ratio of punitive damages to actual damages to guide us here. It would clearly be fruitless for us to engage in the metaphysics

of "legal certainties" in the absence of legal rules by which to measure them, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938), Bell v. Preferred Life Assurance Society, 320 U.S. 238 (1943).

Although we are unable to grant defendants' motion for summary judgment for the reasons stated, the Beckermans' complaint, which has not been amended to reflect dismissal of their purportedly aggregable claims, is defective in several respects. Accordingly, the Beckermans are directed to file an amended complaint recasting the suit as one for compensatory and punitive damages, if indeed, as plaintiffs assert, that is what it is. The amended complaint should contain the requisite good faith allegation that each member of the class claims in excess of $10,000. and set forth factual allegations appropriate to a suit for punitive damages. The matter will be referred to Honorable Sol Schrieber, a Magistrate of this court, as a special master to report and recommend as to the award of damages and for such proceedings as are necessary in connection therewith. We shall review the question of jurisdictional amount at such time as we act upon the Master's report.

The motion for summary judgment is denied subject to the conditions set forth above.

It is so ordered.

Dated: New York, New York MORRIS E. LASKER
November 20th, 1974

FOOTNOTES

1. 364 F. Supp. 1197 (1973).

2. It is undisputed that the Beckermans invested $3,750. each, of a cash capital totalling $562,500. This amounts to a .66% interest in the syndicate for each of the Beckermans, or roughly a 1/150th participation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

Plaintiffs,

-against-

IRA J. SANDS and F. S. MANAGEMENT CORP.,

Defendants.

---x

72 Civ. 3188 (M.E.L.)

AMENDED COMPLAINT - CLASS ACTION

Plaintiffs, by Schwartz, Kaufmann & Sklaver, their attorneys, complaining of the defendants, allege:

JURISDICTION AND VENUE

1. Plaintiffs are citizens of the State of Florida. Defendant Ira J. Sands ("Sands") is an individual citizen of the State of New York. Upon information and belief, defendant F. S. Management Corp. ("F. S. Management") is a New York corporation. All defendants have an office for the regular conduct of business at 701 Seventh Avenue, New York, New York, within the territorial jurisdiction of this Court.

The matter in controversy as to the plaintiffs and each member of the class, exclusive of interest and costs, exceeds the sum of $10,000.

GENERAL ALLEGATIONS

2. Heretofore in approximately 1951, Sands, together with Jerome Wishner and George Gewanter (herein called the "General Partners") organized Times Square Associates ("Associates") as a general partnership with themselves as the sole partners for

the purpose of acquiring a then existing long-term net lease on the premises known as 701 Seventh Avenue, in the Borough of Manhattan, City and State of New York (herein called the "Premises").

3. In approximately June 1961, Associates became a publicly-held real estate syndicate by each of the General Partners selling $187,500 of participating interests in his own partnership interest to members of the public and in connection with such sales issued a Prospectus in the form annexed as Exhibit 1.

4. Upon information and belief, the General Partners used the proceeds of the sales of the participating interests for the purposes set forth in the Prospectus.

5. The members of the class on whose behalf this action is brought, or their predecessors in title (herein called "Investors") purchased their participating interests from one or another of the General Partners pursuant to the Prospectus.

6. Upon information and belief, at the time that each of the Investors purchased his participating interest from a General Partner, he executed a written agreement in the form annexed as Exhibit 2 (herein called the "Investors Agreement"), except for the identity of the General Partner.

7. Pursuant to the Prospectus and the Investors Agreement, the Premises were to be managed by Tri Management Company, a partnership composed of the General Partners, at no profit to Tri Management Company so that the entire excess of rental income over building operating expenses was to enure to Associates as profit.

8. Upon information and belief, in or about December, 1962, Tri Management Company ceased managing the Premises and thereafter the Premises were managed by First Republic Company, a partnership in which defendant Sands was a partner, and thereafter the Premises were managed by First Republic Corporation of America, a corporation in which Sands was an officer, director and controlling person.

9. Upon information and belief, in approximately May, 1966, First Republic Corporation of America ceased managing the Premises and defendant F. S. Management undertook to manage the Premises.

10. Upon information and belief, Sands is an officer and director of F. S. Management and said corporation is wholly owned and controlled by Sands and members of his family.

11. Upon information and belief, in or about May, 1966, Jerome Wishner and George Gewanter resigned as General Partners of Associates and defendant Sands remained as the sole general partner and agent for all Investors in Associates.

12. Upon information and belief, until the date set forth in Paragraph 11 hereof, each General Partner was a fiduciary for the Investor to whom he sold a participating interest and after that date Sands was a fiduciary for all Investors.

CLASS ACTION ALLEGATIONS

13. This action is brought against defendants Sands and F. S. Management by the plaintiffs, individually and as representatives of the class of persons consisting of the Investors.

14. The class is comprised of approximately 150 persons and it is therefore impracticable to bring them all before the Court.

15. The questions of law and fact common to the class are:

a) Whether Sands has mismanaged the affairs of Associates and breached the fiduciary duty he owed to the Investors by diverting assets and property of Associates to his own use or for his own benefit and to F. S. Management;

b) Whether F. S. Management participated in such unlawful activities and whether F. S. Management was the conduit through which said unlawful diversions occurred;

c) The nature of the relief to which the plaintiffs and the Investors are entitled.

16. Plaintiffs will fairly and adequately protect the interests of the class since plaintiff Ethel Beckerman is a member of a so-called Investors Committee which was elected at a general meeting of the Investors held on June 23, 1970, and plaintiff Abraham Beckerman is her husband.

17. Upon information and belief:

a) The plaintiffs have no individual interest in controlling the prosecution of the action;

b) This is the only action pending which embraces the claims contained herein;

c) It is desirable that the action be maintained in this Court which is convenient to all parties and witnesses; and

d) There are no difficulties likely to be encountered in the management of this action.

FIRST COUNT AGAINST SANDS
AND F. S. MANAGEMENT

18. Upon information and belief, in contravention of the terms of the Investors Agreement and the Prospectus, Sands has caused Associates to pay management fees, leasing commissions and administration fees to First Republic Company, First Republic Corporation of America and F. S. Management.

19. Upon information and belief, since approximately May, 1966, Sands has himself used and has permitted F. S. Management to use a substantial portion of the Premises for their own benefit and for purposes unrelated to the business of Associates without the payment of a fair and reasonable rent to Associates.

20. Upon information and belief, from time to time Sands caused Associates to pay legal fees to various attorneys and law firms for services rendered to Associates and has demanded and received forwarding fees from said attorneys and has represented other persons in transactions in which Associates was involved and has been paid legal fees by such persons.

21. Upon information and belief, Sands has caused Associates to pay various obligations of his own which were unrelated to the business of Associates.

22. Upon information and belief, Sands has caused the affairs and finances of Associates and F. S. Management to be intermingled so that Associates paid various expenses and obligations of F. S. Management.

23. Upon information and belief, Sands has used his position as fiduciary for the Investors and as the person in control of the management of the Premises to gain for himself various forms of gain, profit and income, all to the detriment and at the expense of Associates and the Investors.

24. Upon information and belief, the damages incurred by the plaintiffs and the members of the class exceed $325,000.

SECOND COUNT AGAINST SANDS

25. Upon information and belief, Sands is the agent for the plaintiffs and the other Investors, each of whom has a common interest in the net lease on the Premises and the leasehold improvements thereon, and all assets belonging to Associates which are held by Sands.

26. (a) Upon information and belief, the fair market value of the net lease on the Premises and the leasehold improvements thereon and the furniture and fixtures therein is in excess of $1,048,000.

(b) Upon information and belief, the fair market value of other assets in which the plaintiffs and the other Investors have an undivided interest is in excess of $310,000.

27. Upon information and belief, plaintiffs and the Investors have not received distributions of $56,250 in each year from Associates as provided for in the Prospectus and the Participation Agreement and the distributions they actually received are at least $282,000 less than they would have received if the sum of $56,250 was paid in each year.

28. Upon information and belief, by reason of the wrongful acts of defendant Sands, plaintiffs and each of the other Investors are entitled to recover from him such sums as shall be determined to be the value of their respective interests in the aforementioned assets which are believed to be in excess of $1,156,000.

THIRD COUNT AGAINST
F. S. MANAGEMENT

29. Upon information and belief, the monies wrongfully received by F. S. Management from Associates, as alleged in the first count, were invested by F. S. Management and were used by F. S. Management to purchase assets and properties.

30. Upon information and belief, F. S. Management continued to hold the monies wrongfully received from Associates and the investments made with those monies and the assets and properties purchased with those monies in trust for the benefit of the plaintiffs and the other Investors in Associates.

31. Plaintiffs do not have knowledge or information as to the amounts, if any, to which they and the other investors in Associates may be entitled under this count.

FOURTH COUNT AGAINST
F. S. MANAGEMENT

32. Upon information and belief, F. S. Management received real estate management fees from Associates in excess of $113,000.

33. Upon information and belief, F. S. Management received leasing commissions from Associates in excess of $25,000.

34. By reason of section 442-e, subdivision 3, of the New York Real Property Law, plaintiffs and the Investors are entitled to recover punitive damages in excess of $414,000, in addition to recovering the management fees and leasing commissions actually received by F. S. Management.

FIFTH COUNT AGAINST SANDS

35. Upon information and belief, at the time that the Investors in Associates purchased their interests therein, Sands agreed that he would manage the Premises at actual cost and without any profit or compensation to himself, except as set forth in the Prospectus and the Participation Agreement.

36. Subsequently, on or about August 10, 1966, Sands sent a letter to the Investors in which he reaffirmed said obligation.

37. Upon information and belief, thereafter, Sands knowingly and with intent to appropriate to himself and for his own benefit, began a course of dealings which resulted in the diversion of more than $325,000 from Associates to himself and F. S. Management.

38. In and about May and June, 1970, plaintiff Ethel Beckerman ("Ethel") communicated by mail with the Investors requesting that they attend a meeting to discuss the affairs of Associates and the manner in which they might obtain meaningful information about the affairs of Associates from Sands.

39. Said meeting was held on June 23, 1970 in New York

City.

40. Upon information and belief, numerous Investors attended said meeting.

41. The Investors who were present at said meeting elected an Investors' Committee comprised of ten Investors, including Ethel.

42. The Investors' Committee was authorized by the Investors present at said meeting to cause an inquiry to be made into the affairs of Associates and to report thereon to the Investors.

43. Upon information and belief, Sands caused his agent to be present at said meeting and also caused a representative of Commerce Reporting Service to be present for the purpose of taking verbatim notes of what was said at said meeting.

44. Upon information and belief, the said representative of Commerce Reporting Service took verbatim notes of what was said at said meeting, and thereafter a typewritten transcript was prepared, which transcript came into the possession of Sands.

45. On or about June 24, 1970, Sands and Associates instituted an action against the plaintiffs herein in the Supreme Court of the State of New York, County of New York, index number 10718/70.

46. The complaint in said action was served on or about December 16, 1970, and was verified by Sands.

47. Said complaint alleges that at the aforementioned meeting Mr. and Mrs. Beckerman, both plaintiffs herein, uttered defamatory statements regarding Sands, and Sands prays in said

complaint that he be awarded compensatory damages of $250,000 and punitive damages of $1,000,000.

48. Said complaint alleges that the plaintiffs herein, and each of them, made the following statements:

a) "Greetings, fellow sufferers and investors" [with reference to investors in plaintiff ASSOCIATES, which partnership was under the management of plaintiff SANDS and others].

b) ". . . the figures in the statements [prepared by plaintiff SANDS] to my mind, seemed to be a little eccentric."

c) Plaintiff SANDS is "Mafia controlled";

d) Plaintiff SANDS is illegitimate, a "bastard";

e) Plaintiff SANDS has "cheated the investors".

49. Upon information and belief, Sands had in his possession a copy of the aforesaid transcript of the June 23, 1970, meeting at the time he verified the complaint, or prior thereto.

50. Said transcript discloses that Ethel did not make the following statements:

c) Plaintiff SANDS is "Mafia controlled";

d) Plaintiff SANDS is illegitimate, a "bastard";

e) Plaintiff SANDS has "cheated the investors".

51. Said transcript discloses that Abraham Beckerman did not make any statements at all at said meeting.

52. Upon information and belief, the plaintiffs herein made no statements at said meeting other than as set forth in said transcript.

53. The aforementioned complaint, in the second cause of action therein, further alleges that the plaintiffs herein converted books, records, documents and other personal property of Associates to their own use after wrongfully removing them from the premises of Associates, and Associates prays in said complaint that it be awarded damages of $100,000.

54. Upon information and belief, at the time that Sands verified the aforementioned complaint he knew that the allegations of wrongdoing in the second cause of action were untrue.

55. Upon information and belief, Sands' motive in bringing the action against the plaintiffs herein and in causing Associates to join in said action was to frighten the plaintiffs and to intimidate them into discontinuing their efforts to inquire into the manner in which Sands was managing the affairs of Associates.

56. Upon information and belief, Sands' motive in causing Associates to join in said action was to avoid his being required to pay the legal fees and expenses for prosecuting said action on his personal behalf.

57. One of the ten members of the Investors Committee elected at the meeting held on June 23, 1970, is Mrs. Gussie Manheim ("Manheim").

58. On or about August 11, 1970, Sands instituted an action against Manheim for defamation of character in which he sought money damages of $600,000. Said action was brought by Sands alone against Manheim alone in the Supreme Court of the State of New York, County of New York, and bears index number 15570/70.

59. In the action by Sands against Manheim only the summons was served on Mrs. Manheim but not the complaint. On or about October 23, 1970, Sands made a motion in that action for an order to take the deposition of Mrs. Manheim in order to frame a complaint. In his affirmation dated October 23, 1970, in support of said motion, Sands stated:

> "For a period of time, there have been numerous documents missing from my office relating to my business activity. I have reason to believe that those documents have turned up in the possession of the defendant [Manheim] and may have been removed as part of her conspiracy.
>
> "I have also been informed by third persons as to various injurious untrue statements made about myself by this defendant..."

60. Upon information and belief, at the time that Sands made the foregoing statements in his affirmation, he knew them to be untrue.

61. Upon information and belief, Sands' motive in bringing the action against Manheim was to frighten her and intimidate her into discontinuing her efforts to inquire into the manner in which Sands was managing the affairs of Associates.

62. Upon information and belief, subsequent to June 23, 1970, Sands was instrumental in attempting to organize another committee of Investors in order to work at cross-purposes with the Investors Committee, all with the purpose of impeding and hindering the Investors Committee from conducting its inquiry into the manner in which Sands was managing the affairs of Associates.

63. Upon information and belief, by reason of the wrongful acts of Sands in diverting to himself and for his benefit monies and property of Associates to which he knew he was not entitled, and in wilfully impeding the Investors in the exercise of their rights to inquire into the affairs of Associates so that Sands' wrongful acts would remain undiscovered, and in maliciously bringing an action against Manheim and the plaintiffs herein which he knew to be without merit, plaintiffs and the Investors are entitled to punitive damages in the amount of $1,075,000.

WHEREFORE, plaintiffs demand judgment on behalf of themselves and the Investors:

a) for $325,000 on the first count, together with such further amounts as the Court shall determine was improperly received by the defendants from or on account of their relationship to Associates;

b) for $1,156,000 on the second count, together with such further amounts as the Court shall determine to be the value of plaintiffs' and Investors' interests in Associates in excess of said amount;

c) for an accounting and the impression of a trust by reason of the acts alleged in the third count and a direction that F. S. Management pay them such amounts as the Court shall determine belong to them under the principles of equity;

d) for $552,000 on the fourth count;

e) for $1,075,000 on the fifth count;

f) for such other and further relief as may be just and proper, together with the costs and disbursements of the action.

SCHWARTZ, KAUFMANN & SKLAVER

By: s/ Harvey M. Sklaver
a member of the firm

Attorneys for Plaintiffs
115 Broadway
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(212) 964-7660

EXHIBITS 1 AND 2 TO THE AMENDED COMPLAINT
ARE IDENTICAL WITH EXHIBITS 1 AND 2
TO THE ORIGINAL COMPLAINT

EXHIBIT 1 IS REPRODUCED AT A 11 HEREIN

EXHIBIT 2 IS REPRODUCED AT A 16 HEREIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------------X

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

1/2073

72 Civ. 3188

Plaintiffs,

-against-

MEMORANDUM

IRA JAY SANDS and F.S. MANAGEMENT CORP.,

Defendants.
---------------------------------------X

APPEARANCES:

SCHWARTZ, KAUFMANN & SKLAVER, ESQS.
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Of Counsel: HARVEY M. SKLAVER, ESQ.

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Of Counsel: FRANK WEINSTEIN, ESQ.
SAMUEL GOTTLIEB, ESQ.

LASKER, D.J.

This suit by investors in Times Square Associates, a real estate syndicate, for breach of trust by its general agent and the corporation he controls, has provoked a virtually endless series of pre-trial skirmishes relating to the court's jurisdiction of the action. For the reasons stated below, on this latest skirmish the complaint is dismissed.

Defendants have consistently argued that there is lacking the necessary jurisdictional amount ($10,000. for each of 154 class members) to confer subject matter jurisdiction in this court. We have on several previous occasions held that the complaint could not be dismissed because it could not be said with legal certainty that defendants would be unable to recover the jurisdictional amount, particularly inasmuch as jurisdiction depends heavily on an unliquidated claim for punitive damages. In our most recent Memorandum on the subject, we expressed strong doubt as to the existence of jurisdiction, but denied defendants' motion to dismiss on condition that plaintiffs file "an amended complaint recasting the suit as one for compensatory and punitive damages, if indeed, as plaintiffs assert, that is what it is."[1/] We also stated that the amended complaint should allege facts

sufficient to support a claim for punitive damages under New York law, which imposes an unusually high standard for recovery of such damages.

Defendants move, pursuant to Rules 12 and 56, Federal Rules of Civil Procedure, to dismiss the amended complaint, contending as to some counts that they fail to state a claim and, as to the complaint as a whole, that subject matter jurisdiction is lacking.

I.

Plaintiffs' principal claims are contained in Counts I and V. Count I, which seeks compensatory damages of $325,000., contains essentially the same allegations as the entire original complaint. It alleges violation by Sands of the terms of the Investors Agreement by causing Associates to pay various fees to several management agencies in which he had a financial interest. It also alleges breach of trust by Sands and conversion of Associates' assets to the use of Sands or defendant F.S. Management.

Count V alleges a pattern of conduct by Sands to conceal his alleged defalcations, and seeks punitive damages of $1,075,000. but no compensatory damages. Defendants are correct that punitive damages cannot be awarded except as ancillary to a claim for compensatory

damages. However, because Count V clearly relates to the course of conduct alleged in Count I whereby Sands allegedly diverted some $325,000. from Associates, we adopt plaintiffs' suggestion that Counts I and V be treated together as a single count for compensatory and punitive damages, totalling $1,400,000.

Defendants argue that the claim for compensatory damages of $325,000. is clearly excessive because the damage figure includes alleged damages incurred after the commencement of this action.[2/] See affidavit of Harvey M. Sklaver, September 4, 1974. According to defendants, whose figures plaintiffs do not dispute, $101,763. of the claimed damages were incurred after the action was commenced. Defendants arrive at this figure (1) by eliminating from the computations set forth in the Sklaver affidavit all "estimated" damages allegedly incurred in 1973 and 1974; (2) by deducting roughly one-half the amounts claimed for 1972, because the action was commenced on July 22, 1972; and (3) by otherwise assuming (but not conceding) plaintiffs' computations to be a good faith estimate of damages.

Adopting defendants' computations, which appear to be more than reasonable, plaintiffs are left with a claim for compensatory damages in Count I of $224,662; accordingly they must establish that they have in good

faith alleged punitive damages amounting to seven times actual damages.

Count V alleges the facts which plaintiffs claim convert this suit from a "garden-variety" action for breach of duty into one justifying the award of punitive damages. It alleges that in June, 1970 the Beckermans convened a meeting of investors to discuss Associates' affairs; Sands caused "his agent" (Paragraph 43) and a stenographic reporter to be present; Sands thereafter began a lawsuit in Supreme Court, New York County, against the Beckermans for defamatory statements they allegedly uttered at the meeting, and for alleged conversion of documents belonging to Associates; and that Sands also began a suit against an investor named Mannheim for defamation, for the alleged purpose of intimidating her into discontinuing her efforts into inquiring into Associates' affairs.

Generously viewed to allege a general pattern of concealment or intimidation by Sands, in which the slander actions were the key events, Count V does not state a claim for punitive damages in this class action. Even assuming that the prosecutions are established to have been malicious,[3/] they were not directed at the entire plaintiff class in the present suit, but only at

Beckerman and Mannheim; any damages resulting from the prosecutions were suffered by, and are recoverable only by them, and cannot form a part of the jurisdictional amount for the other class members. In view of the fact that each class member has a claim for compensatory damages under Counts I and V of less than $1,500. ($325,000. less $100,000. which accrued after the commencement of the action, divided by 154 class members), they have failed adequately to allege the necessary $10,000. amount.

Even assuming that Counts I and V (as combined) state a claim for punitive damages as to the entire class, it is a legal certainty that plaintiffs cannot recover the necessary seven-fold compensatory damages. At most Counts I and V allege that Sands (1) breached his fiduciary duties in taking for himself the management and leasing commissions for services which Associates would in any event have had to pay to an outside agent; (2) made casual use of Associates' assets for his own benefit, and (3) failed to disclose the nature of his activities and reacted over-zealously to the criticism of certain investors in Associates. These allegations describe conduct which is lamentable enough. However, the courts of New York would not award punitive damages in such a case.[4/] As the court said in Knotakis v. Carrel, 425

F.2d 892, 907 (2d Cir. 1970):

> "The most recent New York decisions indicate that the state courts should be very selective in allowing punitive damage awards; the factors considered in exercising this selectivity include the nature of the conduct, the sufficiency of an award of punitive damages and other remedies to deter such conduct in the future, and the likelihood that an award of compensatory damages would induce the plaintiff to sue."

Consideration of such factors in the present case leads inescapably to the conclusion that plaintiffs cannot recover the necessary jurisdictional amount on Counts I and V.

II.

For the reasons stated below, the remaining counts fail to allege sufficient additional damages to make up the required jurisdictional amount.

Count II alleges that Sands is the "Agent" for plaintiffs in his capacity as sole General Partner of Associates; that the fair market value of Associates' assets is some $1,358,000; that the Investors have not received some $282,000. in distributions contemplated by the prospectus, and that (at Paragraph 28) "by reason of the wrongful acts of defendant Sands, plaintiffs ... are entitled to recover from him ... the value of their respective interests." These allegations do not state a claim. As to the $282,000. in distributions, the prospectus (Complaint, Exhibit 1) plainly does not

guarantee any distributions at all; it speaks only of "anticipated" annual distributions aggregating the total in the amount claimed by plaintiffs. The clear and detailed terms of the prospectus also state (at p. 7) that "profits and losses of Associates will be shared proportionately by all participants ... Losses, if any, will be borne by all participants ... in accordance with their respective investments."

Shorn of the claim for distributions, Count II merely seeks to cast the "amount in controversy" in terms of the total worth of the enterprise. However, the controversy presented in this suit is whether defendants are liable in damages for their alleged malfeasance. Accordingly, the amount in controversy is measured by the damages resulting from such asserted misconduct, rather than by the value of the entire enterprise. Whether Count II is viewed as the jurisdictional bootstrap for Count I, or as a separate claim for breach of contract to pay distributions, it fails to state a claim.

III.

Count III alleges that defendant F.S. Management received moneys from Associates and invested it in property for its own benefit; and (at Paragraph 31) that "Plaintiffs do not have knowledge or information as to the amounts, if

any, to which they ... may be entitled under this count." It is settled that a complaint must be based on more than speculation and conjecture, see Benham v. World Airways, 422 F.2d 359 (9th Cir. 1970) and, of course, where plaintiffs' jurisdictional allegations are put in question by defendants as they are here, plaintiffs have the burden of supporting them by competent proof. Count III fails both tests and is dismissed.[5/]

IV.

Count IV alleges that F.S. Management received management fees from Associates in excess of $113,000. and leasing commissions in excess of $25,000. It is undisputed that F.S. Management was not licensed as a real estate broker, but that Sands, who controlled F.S. Management and was its principal officer, was so licensed. Count IV seeks to recover damages of $552,000. (quadruple damages for the alleged fees) pursuant to §442-e(3), N.Y.R.P.L. which makes an unlicensed real estate broker liable to an "aggrieved person" for a "penalty of ... not more than four times the [commissions] received by him, as may be determined by the court..."

It is a legal certainty that plaintiffs cannot recover $552,000. ($138,000. in compensatory damages for fees and leasing commissions, and $414,000. in punitive

damages). As to the claimed compensatory damages of $138,000., a portion of such damages indisputably occurred after the commencement of this action. Deduction of the $56,000. in fees attributable to 1973 and 1974, (putting aside the amount attributable to the period July 22, 1972 to December 31, 1972) leaves some $80,000. in alleged damages; accordingly, the maximum recovery under §442-e(3) would be $320,000.

However, we find that the New York Courts would not allow punitive damages against defendants. The purpose of the §442-3(3) is to protect the public from unlicensed brokers,[6/] but, as a penal statute it is strictly construed against the person seeking to enforce it.[7/] In the present case, the violation, if any, was purely technical because F.S. Management is clearly the alter ego of Sands, who is a licensed broker and whose family wholly owns F.S. Management. Assuming that Associates could recover <u>any</u> commissions under §442-e(3) for a violation of this nature, it is certain that no punitive damages would be awarded. See <u>Galbreath-Ruffin Corp. v. 40th and 3rd Corp.</u>, 25 A.D.2d 114, 267 N.Y.2d 520, modified on other grounds, 19 N.Y.2d 354, 280 N.Y.S.2d 126 (1966), <u>Vin v. Kall</u>, 196 N.Y.S.2d 237 (1960).

Although Count IV states a claim for approximately

$80,000., our finding does not assist plaintiffs' efforts to allege the required jurisdictional amount. Under New York law, the remedy created by §442-e(3) is an exclusive one to which the doctrine of election of remedies applies. Kilpatrick v. Rose, 96 N.Y.S.2d 276, appeal dismissed, 96 N.Y.S.2d 681 (1950). Accordingly, plaintiffs cannot recover the commissions paid to F.S. Management both for the breach of trust charged in Count I and for the statutory violation charged in Count IV.

V.

Bearing in mind that this lawsuit has been pending for nearly three years, and that the court by Memorandum dated November 24, 1974 specifically directed plaintiffs to marshal in their amended complaint any facts which support such a cause of action, we assume that plaintiffs have unleashed all the weapons of pleading at their disposal.

We conclude, nonetheless, that they have failed to establish the requisite jurisdictional amount. Indeed, although several affidavits have been filed in this action by plaintiffs' counsel, no class member has filed an affidavit as to the facts of the case or the damages claimed. As a practical matter therefore, plaintiffs have not only failed to establish jurisdiction, but defendants' version of the facts, at least as to the damage issue which concerns us here, is essentially

undisputed.

Accordingly, defendants' motion to dismiss the amended complaint is granted. No costs to either side.

It is so ordered.

Dated: New York, New York
March 20, 1975.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. Of course plaintiffs must affirmatively establish that subject matter jurisdiction exists. As the court stated in McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936):

   > "[A plaintiff] must carry throughout the litigation the burden of showing that he is properly in court ... If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established ... by a preponderance of evidence."

   See also Arnold v. Troccoli, 344 F.2d 842, 845 (2d Cir. 1965), Schroeder v. Leah, 242 F.Supp. 787 (S.D.N.Y. 1965). Moreover, in cases involving punitive damages where the jurisdictional amount is in question, we are required to scrutinize plaintiffs' complaint and supporting proof particularly closely. Zahn v. International Paper Co., 469 F.2d 1033, 1034 n.1 (2d Cir. 1972) affirmed, 414 U.S. 291 (1973)

2. This action was commenced on July 22, 1972 and the jurisdictional facts must be ascertained as of then. Alleged damages incurred after the commencement of suit may not be considered in determining whether the requisite jurisdictional amount is present. I Moore, Federal Practice, p. 831, n.1; Anderson-Thomson, Inc. v. Logan Grain Co., 238 F.2d 598 (10th Cir. 1956), Wade v. Rogala, 270 F.2d 280 (3d Cir. 1959).

3. Viewed solely as a claim for malicious prosecution initiated by Sands, Count V does not state a claim because the defendants in the slander actions have not yet prevailed, a condition precedent to an action for malicious prosecution.

4. The courts of New York have used a variety of phrases to describe the necessary degree of culpability which will support a claim for punitive damages. There must be "fraud, aimed at the public generally, [which] is gross and involves high moral culpability", Walker v. Sheldon, 10 N.Y.2d 401, 404-405, 223 N.Y.S.2d 488 (1961); "utter

recklessnes," Caldwell v. New Jersey, 47 N.Y.282, 296 (1872); "reckless and of a criminal nature," Cleghorn v. New York Cent. & H.R.R.R., 56 N.Y.44, 48 (1874); conduct committed "recklessly or wantonly, i.e., without regard to the rights of the plaintiff, or cf people in general," Soucy v. Greyhound Corp., 27 A.D. 2d 112,113, 276 N.Y.S. 2d 173, 175 (3d Dept. 1967), and more than "culpable negligence." Noonan v. Luther, 119 App. Div. 701, 104 N.Y.S. 684 (3d Dept. 1907).

5. We note, however, that if plaintiffs were able in good faith to allege a figure for money damages attributable to such profits realized by F.S. Management on funds converted from Associates, Count III might properly be considered to be a part of Count I for purposes of determining jurisdiction.

6. See Vin v. Kall, 196 N.Y.S.2d 237 (1960); Julian J. Studley v. Geisinger, 177 N.Y.S. 2d 776 (1968), aff'd 7 A.D. 2d 844, 182 N.Y.S. 2d 326 (1st Dept.) (1959); 2 Park Ave. Assoc. v. Cross & Brown Co., 43 A.D.2d 37, 349 N.Y.S.2d 383 (1st Dept. 1973).

7. See Ruiz v. Mendez, 86 F.Supp. 29 (D. Puerto Rico 1949); Galbreath-Ruffin Corp. v. 40th & 3rd Corp., 25 A.D. 2d 114, 267 N.Y.2d 520, modified on other grounds, 19 N.Y. 2d 354, 280 N.Y.S.2d 126 (1966); Williams & Co. v. Collins Tuttle & Co., 163 N.Y.S.2d 142, aff'd in part, reversed in part on other grounds, 6A.D. 2d 302, 176 N.Y.S.2d 99, appeal denied, 6 A.D. 2d 1006, 178 N.Y.S.2d 212 (1956); Meyer v. Stein, 290 N.Y.S. 467, aff'd, 247 App. Div. 685 (1936).

U.S. District Court
Filed
MAR 27, 1975
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--x

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

Plaintiffs,

-against-

IRA JAY SANDS and F.S. MANAGEMENT CORP.,

Defendants.

--x

72 Civ.3188 MEL

JUDGMENT

The defendants having moved to dismiss the amended complaint herein and the plaintiff having opposed said motion and the Court, by a Memorandum and Order dated March 20, 1975 having granted defendants' motion, it is hereby

ORDERED, ADJUDGED AND DECREED, that the complaint herein is dismissed without costs to either side.

Dated: New York, N.Y.
March 25th, 1975.

/s/ Morris E. Lasker
MORRIS E. LASKER
United States District Judge. MA

Judgment entered: 3-31-75

Raymond F Burghardt
Clerk.

Microfilm
March 31, 1975

ENDORSEMENT

ETHEL BECKERMAN and ABRAHAM BECKERMAN, etc., Plaintiffs, v. IRA JAY SANDS and F.S. MANAGEMENT CORP., Defendants.
72 Civ. 3188

LASKER, D.J.

Plaintiffs seek to reargue the same issue raised and decided adversely to them in our memorandum of October 11, 1973: whether plaintiffs' claims may be aggregated for purposes of establishing the requisite jurisdictional amount. The motion is untimely. Plaintiffs' characterization of the present motion as one based on Rule 59(e), Federal Rules of Civil Procedure (motion to alter or amend judgment) is incorrect, see Wright and Miller, Federal Practice and Procedure, §§2801 et seq. Under the applicable rule, Rule 9(m) of the Local Rules of this court (motion to reargue), the present motion should have been made some eighteen months ago, and in any event merely reasserts the same arguments rejected in our October, 1973 memorandum.

The motion is denied. It is so ordered.

Dated: New York, New York
May 14, 1975.

MORRIS E. LASKER
U.S.D.J.

A108

Copy Recvd
Weinstein + Levinson
9/19/75
Attys for defendants - appellees